

84-633

No.

Office - Supreme Court, U.S.
FILED

OCT 18 1984

ALEXANDER L. STEVAS,
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

EDWARD K. WHEELER,
Petitioner,

v.

INTERSTATE COMMERCE COMMISSION,
UNITED STATES OF AMERICA

and

UNION PACIFIC CORPORATION, *et al.*,
Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA**

RICHARD H. STREETER
1729 H Street, N.W.
Washington, D.C. 20006
(202) 337-6500

Attorney for
Edward K. Wheeler

QUESTION PRESENTED

Whether the Interstate Commerce Commission in approving the merger of The Western Pacific Railroad Company into a wholly-owned subsidiary of the Union Pacific Corporation satisfied its duty, recognized by this Court in *Schwabacher v. United States*, 334 U.S. 182 (1948), to protect the interests of the minority shareholders of The Western Pacific Railroad Company and to insure that the merger terms are just and reasonable.

PARTIES IN THE COURT BELOW

American Train Dispatchers Association
Atchison, Topeka & Santa Fe Railway Company
Brotherhood of Maintenance of Way Employees
Brotherhood of Railway & Airline Clerks
Brotherhood of Railway Signalmen
Chicago & North Western Transportation Company
Denver & Rio Grande Western Railroad Company
International Association of Machinists &
Aerospace Workers
Interstate Commerce Commission
Kansas City Southern Railway Company
Louisiana & Arkansas Railway Company
Missouri Pacific Corporation
Missouri Pacific Railroad Company
Pacific Rail System, Inc.
St. Louis Southwestern Railway Company
Southern Pacific Transportation Company
Union Pacific Corporation
Union Pacific Railroad Company
United States of America
United Transportation Union
The Western Pacific Railroad Company
Edward K. Wheeler

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES IN THE COURT BELOW	ii
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
A. Background	2
B. Proceedings Before the Interstate Commerce Commission	3
C. Proceedings Before the Court of Appeals	5
REASONS FOR GRANTING THE WRIT	6
I. THE DECISIONS BELOW CONFLICT WITH PRIOR DECISIONS OF THIS COURT AND DEPRIVE PETITIONER OF JUST AND REASONABLE COMPENSATION FOR HIS PROPERTY	6
II. THE COMMISSION'S DECISION IS AN UN- EXPLAINED DEPARTURE FROM PRIOR NORMS	12
CONCLUSION	14

TABLE OF AUTHORITIES

CASES:	Page
<i>Atchison, T. & S. F. Ry. Co. v. Wichita Board of Trade</i> , 412 U.S. 800 (1973)	12
<i>Erie R. Co. Merger</i> , 312 I.C.C. 185 (1960)	8
<i>Florida East Coast Ry. Co. Reorganization</i> , 282 I.C.C. 81 (1951)	14
<i>Great Northern Pac.—Merger—Great Northern</i> , 331 I.C.C. 228 (1967)	9
<i>Louisville & N. R. Co. Merger</i> , 295 I.C.C. 457 (1957)	8, 14
<i>Mills v. Electric Auto-Lite Co.</i> , 552 F.2d 1239 (7th Cir. 1977), cert. denied, 434 U.S. 922 (1977)	8
<i>New Haven Inclusion Cases</i> , 399 U.S. 392 (1970) ..	10
<i>Norfolk & W. Ry. Co. Merger</i> , 307 I.C.C. 401 (1959)	14
<i>Norfolk & W. Ry. Co. and New York C. & St. L. R. Co. Merger</i> , 330 I.C.C. 780 (1967)	14
<i>Northern Lines Merger Cases</i> , 396 U.S. 491 (1970)	6, 10
<i>Pennsylvania R. Co.—Merger—New York Central R. Co.</i> , 331 I.C.C. 643 (1967)	9
<i>Pere Marquette Ry. Co. Merger</i> , 267 I.C.C. 207 (1947)	9
<i>Schwabacher v. United States</i> , 334 U.S. 182 (1948)	i, 1, 3, 6-7, 11, 12, 13, 14
<i>Seaboard Air Line R. Co.—Merger—Atlantic Coast Line</i> , 320 I.C.C. 122 (1963)	8, 9
<i>Seaboard World Airlines, Inc. v. Tiger Intern., Inc.</i> , 600 F.2d 355 (2nd Cir. 1979)	8
<i>Secretary of Agriculture v. United States</i> , 347 U.S. 645 (1954)	12
<i>Southern Pac. Transportation Co. v. I.C.C.</i> , 736 F.2d 708 (D.C. Cir. 1984)	1, 5, 6, 8, 9
<i>Tri-Continental Corp. v. Battye</i> , 74 A.2d 71 (Del. Supr. 1950)	10
<i>Union Pacific Corporation, Pacific Rail System, Inc., and Union Pacific Railroad Company—Control—Missouri Pacific; Corporation and Missouri Pacific R. Co.</i> , 366 I.C.C. 459 (1982)	1, 3, 4, 5, 9, 12, 13, 14

TABLE OF AUTHORITIES—Continued

	Page
<i>Weinberger v. UOP, Inc.</i> , 457 A.2d 701 (Del. Supr. 1983)	10

MISCELLANEOUS:

Valuation of Dissenters' Stock under Appraisal Statutes, 79 Harv. L. Rev. 1453 (1966)	11-12
---	-------



IN THE
Supreme Court of the United States

OCTOBER TERM, 1984

No.

EDWARD K. WHEELER,
v. *Petitioner,*

INTERSTATE COMMERCE COMMISSION,
UNITED STATES OF AMERICA

and

UNION PACIFIC CORPORATION, *et al.,*
Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA**

OPINIONS BELOW

The opinion of the Interstate Commerce Commission in Finance Docket No. 30,000, *Union Pacific Corporation, Pacific Rail System, Inc., and Union Pacific Railroad Company—Control—Missouri Pacific Corporation and Missouri Pacific Railroad Company* and embraced cases is reported at 366 I.C.C. 459. It is reproduced at pp. 39a-615a of the separately bound appendix to petitions for certiorari ("App."). The opinion of the Court of Appeals denying consolidated petitions for review of that proceeding is reported at 736 F.2d 708, and is reproduced at App. 1a-38a.

JURISDICTION

The decision of the Court of Appeals was issued on May 22, 1984 and timely petitions for rehearing were denied on July 20, 1984. This Court has jurisdiction under 28 U.S.C. § 1254(1). The Court of Appeals had jurisdiction under 28 U.S.C. § 2321 and § 2342(5).

STATUTORY PROVISIONS INVOLVED

This case involves the Interstate Commerce Act ("ICA"), 49 U.S.C. §§ 11343 and 11344. The pertinent provisions are reproduced at App. 639a and 641a.

STATEMENT OF THE CASE

This petition arises out of a finding by the Interstate Commerce Commission (hereinafter "ICC" or "Commission") that the price offered by a wholly-owned subsidiary of the Union Pacific Corporation (hereinafter "UP"), for the outstanding shares of The Western Pacific Railroad Company (hereinafter "WP"), pursuant to an agreement for merger, was fair and reasonable. As we discuss hereinafter, the Commission's methodology disregarded a significant portion of the value of the WP shareholders' contribution to the merged company and deprived them of just and reasonable compensation for their holdings contrary to the principles embodied in *Schwabacher v. United States*, 334 U.S. 184 (1948). Furthermore, the novel analytical approach adopted by the Commission for use in this case, but which it specifically refused to "prescribe . . . for general use in evaluating the fairness of terms to shareholders" is arbitrary and capricious and an unexplained and impermissible departure from prior norms.

A. Background

Immediately following the divestiture of WP and its subsidiaries by Western Pacific Industries in early 1979, UP, through a subsidiary, purchased approximately 10%

of the outstanding Class A common shares of WP on the open market. Later in the fall of 1979, UP, in order to realize its longstanding strategic objective to gain direct access to the San Francisco Bay area and northern California, inquired whether the WP was for sale. Upon receiving an affirmative response, the railroads conducted further intermittent discussions. These discussions culminated in a meeting held in New York City on the afternoon of January 18, 1980. During the course of that afternoon, the price to be paid by UP for all outstanding WP shares was decided. This figure, which was based solely on WP's "stand alone" value, did not take into consideration either the current value of WP's real estate or the merger benefits that would result by virtue of the merger. Following approval on January 22 by the UP Executive Committee and by the WP Board of Directors, UP mailed to the remaining WP shareholders its tender offer which required the tendering of all shares by March 3, 1980.

B. Proceedings Before the Interstate Commerce Commission

Following the filing of appropriate applications by the railroads seeking the approval of the ICC under the Interstate Commerce Act, 49 U.S.C. § 11343, oral hearings were held. Petitioner and other dissenting shareholders appeared and actively contested the \$20.00 per share price being offered by UP for their shares. Thereafter, the ICC issued its decision entitled *Union Pacific Corporation, Pacific Rail System, Inc., and Union Pacific Railroad Company—Control—Missouri Pacific Corporation and Missouri Pacific Railroad Company*, 366 I.C.C. 459 (1982) (App. 39a-615a). After acknowledging its responsibility under *Schwabacher v. United States*, *supra*, 334 U.S. at 201 "to see that the interests of the minority stockholders are protected and that the overall proposal is just and reasonable to those stockholders," the Commission further noted its "duty to see that the minority interests are protected, especially in the absence of arms'

length bargaining or where terms have been imposed by management interests adverse to any class of stockholders." 266 I.C.C. at 635 (App. at 301a).

Having articulated the above principles, the ICC announced its intention to utilize the capitalization of earnings method to determine the value of stock. After disclaiming the significance of equity or book value in the absence of a railroad's liquidation or nationalization, the ICC tersely stated that "land values are of little or no significance in determining the value of stock" 366 I.C.C. at 636 (App. at 302a) and that "the rights of stockholders and the value of their respective stock is to be measured by earnings power." 366 I.C.C. at 336 (App. at 303a).

Upon announcing that the terms of the UP/WP transaction "are just and reasonable" and that it had concluded "that the \$20 per share offer falls within a reasonable range of values" (*id.*) for WP stock to be acquired by UP, the ICC began a series of computations to reflect how it had reached its ultimate conclusion, in the course of which, the Commission initially found that WP could be expected to "have a market value of about \$67 per share when the merger benefits have been fully realized." 366 I.C.C. at 638 (App. at 304a). It then discounted the \$67 per share value for a period of five years to arrive at "a present value at time of consummation of \$38 per share." 366 I.C.C. at 638 (App. at 305a).

The Commission then introduced an entirely new concept which it characterized as the "merger premium" and proceeded to manipulate the value further downward. As explained by the ICC, the "merger premium" was the difference in the market value of WP stock immediately prior to UP's tender offer and the present value which the Commission, after discounting, had found to be \$38 per share. The Commission next allocated a variable share of the "merger premium" to the WP shareholders, and concluded that the resulting

amounts, when added to the market value of the WP stock before the tender offer, would yield a range of reasonable prices from \$16.85 per share to \$26.25 per share. Since \$20 per share falls within that range, the Commission concluded that \$20 per share was fair and reasonable.

Without further explanation of the facts which necessitated use of the curious series of calculations detailed above, the Commission noted that its analysis of the UP offer "is based on the specific facts presented in this proceeding. *We do not prescribe this analytical approach for general use in evaluating the fairness of terms to shareholders.*" [Emphasis added] 366 I.C.C. at 638 (App. at 306a).

C. Proceedings Before the Court of Appeals

Timely petitions for review of the ICC's decision were subsequently filed in the Court below by Wheeler and a number of other parties.¹ In petitioning for review, Wheeler did not ask the court to set aside the Commission's approval of the consolidation. Rather, he only requested the court to "remand the question of the valuation of WP stock back to the Commission for further consideration." 736 F.2d at 726 (App. at 36a).

The Court of Appeals, after concluding "that the Commission's methodology of valuation is reasonable and that its conclusions are supported by substantial evidence" (*id.*) briefly considered certain of petitioner's specific complaints. Focusing on the Commission's treatment of "the merger premium," the court concluded that "the Commission explicitly took into account the enhanced value of WP stock as a result of the consolidation." (*Id.*)

¹ Wheeler's petition was consolidated by the court with various other petitions filed by competing railroads and rail labor unions. Following the filing of briefs and oral argument, the court issued its *per curiam* opinion in which it affirmed the Commission's decision in all but one respect. See *Southern Pac. Transportation Co. v. I.C.C.*, 736 F.2d 708 (D.C. Cir. 1984), (App. 1a-38a).

The lower court did not address Wheeler's contention that the Commission's action in this regard was an unexplained departure from a long line of Commission precedents and had no basis in the record. The lower court further found that there had been arms' length negotiations between WP and UP and that the Commission had not simply relied on the judgments of WP's financial experts, but had "found that the \$20 per share price for WP stock was fair on the basis of its own independent analysis." 736 F.2d at 726 (App. at 36a-37a).

Finally, the lower court, while observing that the Commission's discussion of the issue "is unduly condensed" 736 F.2d at 726 (App. at 37a), sustained the ICC's refusal to consider the current market value of WP's industrial land holdings. Once again the court did not address the issue of whether the Commission's action was an unexplained departure from prior norms as Wheeler contended.

REASONS FOR GRANTING THE WRIT

I. THE DECISIONS BELOW CONFLICT WITH PRIOR DECISIONS OF THIS COURT AND DEPRIVE PETITIONER OF JUST AND REASONABLE COMPENSATION FOR HIS PROPERTY.

In *Schwabacher v. United States*, 334 U.S. 182 (1948), the Court, in construing the predecessors to Sections 11344 and 11346, held that appraisal rights granted by state law do not survive a merger agreement approved by the ICC as just and reasonable. Noting that "such rights are, as a matter of federal law, accorded recognition in the obligation of the Commission not to approve any plan which is not just and reasonable" (*id.* at 201), the Court admonished the Commission, in making its determination, to consider those rights "to the extent that they may affect intrinsic or market values." (*Id.*) As later explained in *Northern Lines Merger Cases*, 396 U.S. 491, 522 (1970), *Schwabacher* "requires that the value of

a shareholder's contribution to a merger be determined in accord with the 'current worth' of his equity." Judged by these standards, the Commission's analysis, which admittedly disregarded the evidence of record concerning the current value of non-transportation lands owned by the WP, is faulty and has resulted in WP shareholders being deprived of just and reasonable compensation reflective of the true value of their contribution to the merged company.

The magnitude of the Commission's error is demonstrated by comparing the total price that UP paid with the total value of the shareholders' contribution. For slightly less than \$28 million, UP acquired a Class I railroad with transportation properties conservatively valued in excess of \$100 million, current cash and other assets of \$75.9 million, and industrial land and non-operating properties with an admitted approximate value of \$137 million dollars.² When WP's liabilities totalling \$150.5 million are subtracted from the value of WP's non-transportation assets alone, it is transparent that UP obtained *all of WP's rail transportation properties (track and operating equipment) for nothing, free of charge, and simultaneously obtained a windfall of non-rail assets currently worth in excess of \$60 million.*

² As revealed in the May 2, 1983 Notice of Special Meeting of Shareholders, after UP acquired most of WP's stock in early 1980, the Company sold 929 acres of WP's industrial land having a book value of \$1,455,000 and realized a net pre-tax profit of \$44,546,000. As of March 31, 1983, WP owned an additional 1,508 acres of industrial and 6,116 acres of non-operating land. As was admitted in the Notice, 450 of the above acres have been appraised and "the current market value of all of such appraised property is substantially greater than its book value and could be in the range of approximately \$25 million." In addition, the market value of the remaining non-appraised industrial property and non-operating property was likewise estimated to be "substantially greater than its book value and could be in the range of approximately \$65 million."

As explained by the lower court, the I.C.C., in determining the value of the WP's stock, rejected consideration of the market value of WP's industrial landholdings, and determined that the value of WP's "stock can best be measured by WP's earning power, as reflected by performance in the stock market" (736 F.2d at 726 (App. at 37a)).³ The Commission's analysis, which the lower

³ In affirming the Commission's reliance on earning power as reflected by stock market performance to measure the value of WP stock, the Court of Appeals relied on *Seaboard World Airlines, Inc. v. Tiger Intern. Inc.*, 600 F.2d 355, 361-62 (2nd Cir. 1979); and *Mills v. Electric Auto-Lite Co.*, 552 F.2d 1239, 1247-1249 (7th Cir. 1977), *cert. denied*, 434 U.S. 922 (1977). These cases embody the principle, as stated in *Seaboard*, that "when market value [of stock] is available and reliable, other factors should not be utilized in determining whether the terms of a merger [are] fair." (600 F.2d at 361). This principle clashes with the Commission's consistent holdings and practice that market prices, though proper for consideration, are not to be given dominant weight. See *Louisville & N. R. Co. Merger*, 295 I.C.C. 457, 498 (1957); *Erie R. Co. Merger*, 312 I.C.C. 185, 236 (1960); and *Seaboard Air Line R. Co.—Merger—Atlantic Coast Line*, 320 I.C.C. 122, 193 (1963). Hence the cases relied upon by the court to provide a justification for the Commission's reliance on the market place are inapposite.

In any event, both decisions recognize that compelling reasons may exist to depart from the general rule where stock market prices are not predicated on a reliable market which reflects the full gamut of information about the company being traded. It is submitted that the instant situation presents several compelling reasons that would justify such a departure. First, the market was wholly unaware of the current market value of WP's industrial lands during the brief period WP was sold either over-the-counter or on the American Exchange. It was only after the release of the proxy material of May 2, 1983, that the current market value of those lands was disclosed. And, as was acknowledged during the course of the hearing before the ICC, the WP's real estate was not even taken into consideration by UP in establishing its \$20.00 per share offer. Second, the market price of WF stock was depressed by the decision of WP management to eliminate dividends and to write down the value of all WP assets immediately following the divestiture from Western Pacific Industries.

court recognized to be "unduly condensed" (736 F.2d at 727 App. at 37a), consists of the wholly unsupported, conclusory statements that "land values are of little or no significance in determining the value of stock" and *are to be considered*, along with equity or book value, *"only in the event of a railroad's liquidation or nationalization."* [Emphasis added.] See 366 I.C.C. at 636 (App. at 302a).⁴

By depriving the WP shareholders of any compensation for the \$137,911,000 of land not used in the operation of the railroad but which was transferred to UP, the Commission failed to protect the stockholders' interests and denied them the equivalent of what they were deprived of. While the perfunctory analysis by the Commission may be permissible in some instances, it clearly is unacceptable where the Commission is charged with insuring that a minority shareholder receives the "current worth" of his equity.

It is further submitted that the Commission's decision is an abrupt, unexplained departure from its own past, consistent consideration of industrial land values in evaluating stock exchange ratios in previous rail merger proceedings. See *Seaboard Air Line R. Co.—Merger—Atlantic Coast Line*, 320 I.C.C. 122, 190 (1963); *Great Northern Pac.—Merger—Great Northern*, 331 I.C.C. 228, 253-260 (1967); *Pennsylvania R. Co.—Merger—New York Central R. Co.*, 331 I.C.C. 643, 679 (1967); *Pere Marquette Ry. Co. Merger*, 267 I.C.C. 207, 241 (1947). Furthermore, this Court has recognized the necessity for the Commission to consider the value of industrial land hold-

⁴ The Commission's further gratuitous observation that "[e]ven assuming that a railroad may be liquidated at some future date, the chances of stockholders recovering book value of their stock are minimal because stockholders very rarely recover book value on liquidation" is belied by the UP's experiences since acquiring the WP shares. See Note 2, *supra*.

ings in establishing stock exchange ratios. See *Northern Lines Merger Cases*, *supra*, 396 U.S. at 516-522; *New Haven Inclusion Cases*, 399 U.S. 392 (1970).⁵

Lastly, it should be noted that consideration of the current market value of WP's industrial lands would be consistent with the standards governing appraisal rights under Delaware law which, were it not for *Schwabacher*, would control.⁶ In *Weinberger v. UOP, Inc.*, 457 A.2d 701 (Del. Supr. 1983), the Delaware Supreme Court recently announced that henceforth the fair value of a stockholder's proportionate interest in a going concern is to be determined by taking "into account all relevant factors." In adopting this standard, the Delaware Court cited with approval its earlier statement in *Tri-Continental Corp. v. Battye*, 74 A.2d 71, 72 (Del. Supr. 1950):

The basic concept of value under the appraisal statute is that the stockholder is entitled to be paid for that which has been taken from him, viz., his proportionate interest in a going concern. By value of

⁵ The primary distinction between the instant case and those referred to above is that the stock exchange ratios in those other cases had been the subject of extensive studies and negotiations which lasted several months. As reflected in the *Northern Lines* decision, 396 U.S. at 516-518, the negotiations concerning the stock exchange ratios between the Great Northern and the Northern Pacific centered to a large extent on the value to be attributed to the Northern Pacific's natural resource properties and ultimately led to concessions by both roads concerning the exchange ratios. In the instant case, the negotiations lasted but one afternoon and, as noted above, never focused on the value of the WP's industrial properties.

⁶ UP has agreed not to object if the minority shareholders demand appraisal of their shares under Delaware law, and has agreed to pay any appraised value to be determined under Delaware law. However, as noted in the May 2, 1983 "Notice of Special Meeting of Shareholders," "there can be no assurance that a Delaware court will not, on its own initiative, determine that *Schwabacher* denies it jurisdiction over an appraisal proceeding commenced in connection with the merger"

the stockholder's proportionate interest in the corporate enterprise is meant the true or intrinsic value of his stock which has been taken by the merger. In determining what figure represents this true or intrinsic value, the appraiser and the courts must take into consideration all factors and elements which reasonably might enter into the fixing of value. Thus, market value, asset value, dividends, earning prospects, the nature of the enterprise and any other facts which were known or which could be ascertained as of the date of merger and which throw any light on *future prospects* of the merged corporation are not only pertinent to an inquiry as to the value of the dissenting stockholders' interest, but *must be considered* by the agency fixing the value. [Emphasis added by the Court in original.]

We submit that the above statement, which is wholly consistent with the *Schwabacher* objective, namely that "each class of stockholder receives an equivalent of what it turns in," would require at a minimum the consideration of the current market value of the WP industrial lands.⁷ Given the non-operational nature of these indus-

⁷ The Court's attention is also invited to the remarks of one commentator concerning "elements of valuation" in situations involving the valuation of dissenters' stock in an ongoing concern. In rejecting a simple reliance on earnings and market value, the author has explained:

Asset value is also criticized as a "liquidation" yardstick [footnote omitted] inappropriate because minority stockholders typically have invested for dividend income or stock appreciation and rarely expect to share in the physical assets. Nevertheless, the significance of assets cannot be disregarded. It would be unrealistic to suppose that a company with no earnings, for whose stock there is no measurable market price, is worthless if it has substantial net assets. Moreover, physical appraisal and revaluation of assets—inventories, for example—may uncover values unsuspected by the market. It is not enough to depend on earnings and market value, because data may be incomplete and results can be affected by actions of the

trial lands, it is particularly important that the ICC's failure to consider the market value of WP's industrial lands be corrected and the minority shareholders receive the economic equivalent of what they turned in. Otherwise, this Court's decision in *Schwabacher* may well prevent the WP shareholders from seeking an appraisal under Delaware law with respect to land which has no "continued use . . . in the public calling" of interstate rail transportation.

II. THE COMMISSION'S DECISION IS AN UNEXPLAINED DEPARTURE FROM PRIOR NORMS.

In affirming the ICC's decision, the lower court failed to address petitioner's contention that the Commission, without any explanation, had departed from its prior norms in several respects and had thereby deprived the minority shareholders of just and reasonable compensation for their shares. That the Commission fashioned a unique "analytical" approach to valuation is not open to question. This was admitted by the Commission when it disclaimed its methodology with the bare assertion that "[w]e do not prescribe this analytical approach for general use in evaluating the fairness of terms to shareholders." 366 I.C.C. 638 (App. 306a). Having adopted a special methodology, it was incumbent upon the Commission to explain the underlying reasons or specific facts which compelled the adoption of the new standards for use only in this case. *Secretary of Agriculture v. United States*, 347 U.S. 645, 653 (1954); *Atchison, T. & S.F. Ry. Co. v. Wichita Board of Trade*, 412 U.S. 800, 808 (1973). The Commission did not even try to satisfy this requirement.

majority or by extraneous pressures. A more reliable result can be reached by comparing at least these three major elements. Note, *Valuation of Dissenters' Stock Under Appraisal Statutes*, 79 Harv.L.Rev. 1453, 1457 (1966).

As reflected in the cases previously referenced,⁸ the Commission's conclusory refusal to consider the value of WP's industrial lands is contrary to well-established Commission precedent in fashioning stock exchange ratios in merger proceedings. In affirming the Commission, the lower court erroneously avoided this issue with the statement that "[i]t is true that the Commission's discussion of this issue is unduly condensed."

The Commission deviated without explanation from a prior norm in one other major respect. Although the Commission properly recognized that "the capitalization of earnings method to determine present and prospective worth is a reasonably conventional and generally accepted method for determining the value of stock" 366 I.C.C. at 636 (App. at 301a), it failed to adhere to its customary application of this method. Instead, after capitalizing WP's projected earnings and concluding that \$38.00, after discounting, represented the "present value of the stock giving effect to the merger benefits," 366 I.C.C. at 638 (App. at 305a), the ICC introduced its novel "merger premium analysis" which resulted in a double discounting of merger benefits and the Commission's finding the minority shareholders to be entitled to only a fraction of the value of the stock which they are being forced to relinquish.⁹ We submit that this adjustment is contrary to the *Schwabacher* requirement that it is the value the stockholder "is contributing to the merger that is to be made good."¹⁰

⁸ See, *supra*, p. 9.

⁹ A thorough review of past Commission cases will not reveal a single instance where the Commission has ever adopted this, or a reasonably similar standard, in order to adjust "the present value of a shareholder's stock" which, under *Schwabacher*, the stockholder is entitled to receive.

¹⁰ The Commission's adjustment is demonstrably in error. The Commission ignored the fact that Applicants' financial studies projecting net income included an allocation by UP of merger benefits between UP and WP. As a result of this allocation of the merger

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

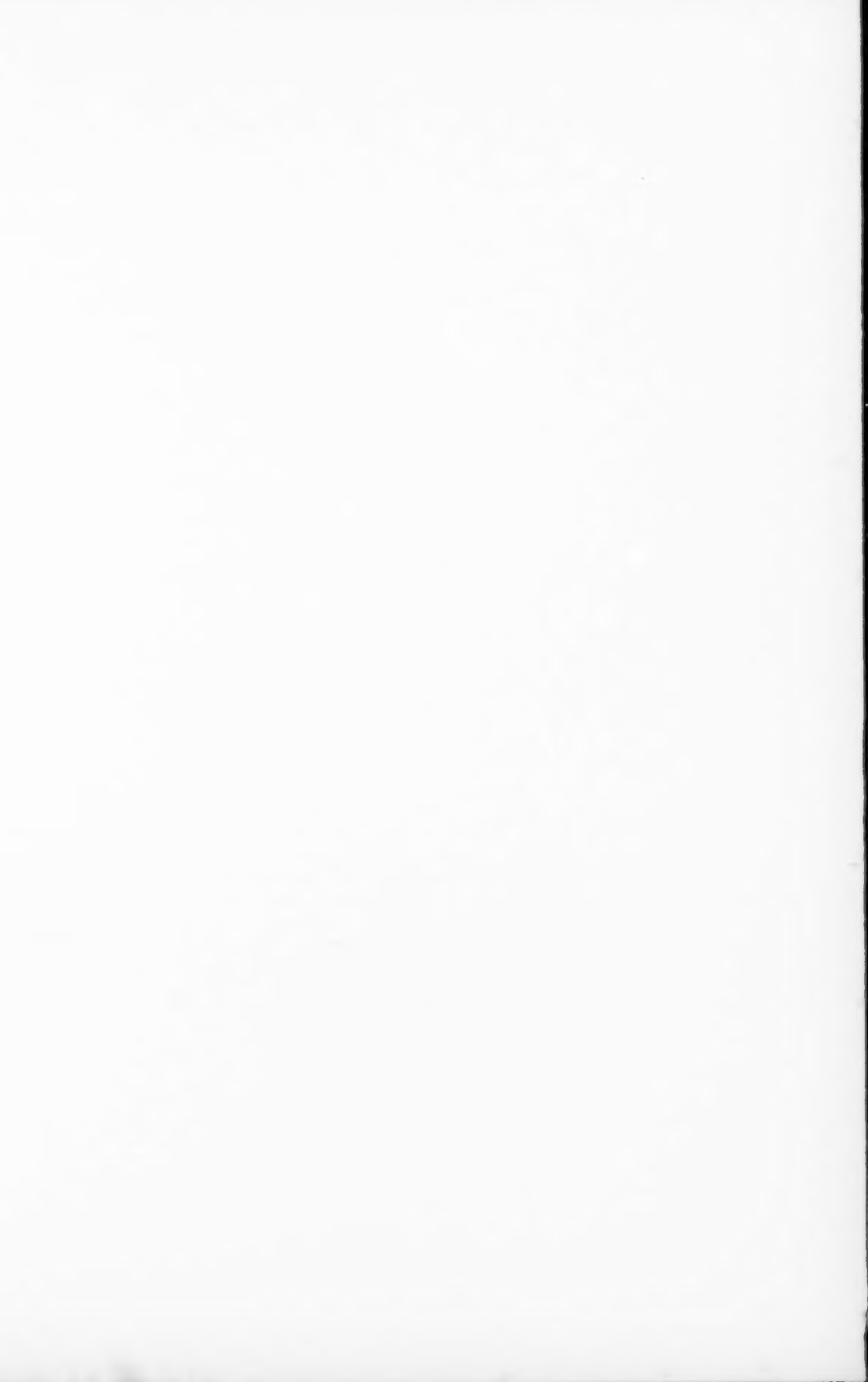
RICHARD H. STREETER
1729 H Street, N.W.
Washington, D.C. 20006
(202) 337-6500

Attorney for
Edward K. Wheeler

benefits, both UP's and WP's projected earnings following the merger reflected the merger benefits by each railroad. The Commission's analysis fails, however, to recognize this prior allocation by UP of a portion of the merger benefits. By adjusting the value of WP stock to reflect "only" the benefits contributed by WP, the Commission erroneously credited UP with a windfall allocation of the benefits—those UP claimed for itself as well as a substantial portion of those which UP had previously recognized should be allocated to WP.

Since the projected net income of UP and WP, which underlies the Commission's finding that WP stock is worth \$38.00 per share, was based upon the traditional 50-50 allocation of benefits which the Commission has consistently used in prior mergers, the Commission's stripping from WP of its share of the merger benefits unreasonably resulted in a substantial understatement of the value of the WP stock.

The Commission's arbitrary reduction of between 10% to 50% of the merger benefits assigned to WP by UP, 366 I.C.C. at 638 (App. at 305a-306a), is an unexplained departure from prior cases. Where friendly mergers between applicants, as here, have previously occurred, the Commission has consistently allocated the future benefits and future system savings equally between the merger partners. See Seaboard Air Line R. Co.—Merger—Atlantic Coast Line, *supra* 320 I.C.C. at 192; Florida East Coast Ry. Co. Reorganization, 282 I.C.C. 81, 159 (1951); Louisville & N. R. Co. Merger, *supra* 295 I.C.C. at 497 (1957); Norfolk & W. Ry. Co. Merger, 307 I.C.C. 401, 430 (1959); and Norfolk & W. Ry. Co. and New York, C. & St. L. R. Co. Merger, 330 I.C.C. 780, 801 (1967). In the absence of a reasoned explanation, the ICC should be required to adhere to the same standards that it has traditionally imposed.



3 2 2
Nos. 84-621, 84-633, 84-641

Office - Supreme Court, U.S.
FILED

JAN 11 1985

ALEXANDER L. STEVAS,
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1984

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES,
EDWARD K. WHEELER, *et al.*,
Petitioners,
v.

UNITED STATES OF AMERICA,
THE INTERSTATE COMMERCE COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the
District of Columbia Circuit

BRIEF OF RESPONDENTS UNION PACIFIC CORPORATION,
UNION PACIFIC RAILROAD COMPANY,
MISSOURI PACIFIC CORPORATION,
MISSOURI PACIFIC RAILROAD COMPANY
AND THE WESTERN PACIFIC RAILROAD COMPANY
IN OPPOSITION TO PETITIONS

WILLIAM J. McDONALD
345 Park Avenue
New York, New York 10154

JAMES V. DOLAN
PAUL A. CONLEY, JR.
1416 Dodge Street
Omaha, Nebraska 68179

CHARLES A. MILLER*
GREGG H. LEVY
Covington & Burling
1201 Pennsylvania Ave., N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-6000

Counsel for Respondents
Union Pacific Corporation, *et al.*

* Counsel of Record

TABLE OF CONTENTS

	<u>Page</u>
STATEMENT OF THE CASE.....	2
SUMMARY OF ARGUMENT	5
REASONS FOR DENYING THE WRIT	6
KCS	6
The Labor Parties	11
Wheeler	12
CONCLUSION	14

TABLE OF AUTHORITIES

	<u>Page</u>
CASES:	
<i>Application of Delaware Racing Ass'n</i> , 42 Del. Ch. 175 (Del. 1965)	13
<i>Atchison, Topeka and Santa Fe Railway Co. v. Interstate Commerce Commission</i> , 51 U.S.L.W. 3507 (U.S. Jan. 11, 1983)	2
<i>Bowman Transportation, Inc. v. Arkansas Best Freight System</i> , 419 U.S. 281 (1974)	10
<i>Brotherhood of Maintenance of Way Employees v. Interstate Commerce Commission</i> , 698 F.2d 315 (7th Cir. 1983)	11
<i>Bruno v. Western Pacific Railroad Co.</i> , C.A. No. 7250 (Del. Ch. Ct., Newcastle County)	12
<i>Citizens to Preserve Overton Park v. Volpe</i> , 401 U.S. 402 (1971)	10
<i>Federal Power Commission v. Texaco</i> , 377 U.S. 33 (1964)	7
<i>Greater Boston Television Corp. v. FCC</i> , 444 F.2d 841 (D.C. Cir. 1970), <i>cert. denied</i> , 403 U.S. 923 (1971)	9
<i>Lamoille Valley Railroad Co. v. ICC</i> , 711 F.2d 295 (D.C. Cir. 1983)	11
<i>Mills v. Electric Auto-Lite Co.</i> , 552 F.2d 1239 (7th Cir.), <i>cert. denied</i> , 434 U.S. 922 (1977)	13
<i>Missouri-Kansas-Texas Railroad Co. v. United States</i> , 632 F.2d 392 (5th Cir. 1980), <i>cert. denied</i> , 451 U.S. 1017 (1981)	10,11
<i>Newrail Co.-Purchase-Western Pacific Railroad</i> , 354 I.C.C. 885 (1979)	12
<i>New York Dock Railway Co.—Control—Brooklyn Eastern District</i> , 366 I.C.C. 60 (1979)	4
<i>New York Dock Railway Co. v. United States</i> , 609 F.2d 83 (2d Cir. 1979)	11

	<u>Page</u>
<i>Norfolk and Western Railway Co.—Trackage Rights—Burlington Northern</i> , 354 I.C.C. 605 (1978), <i>modified by Mendocino Coast Ry., Inc.—Lease and Operate</i> , 360 I.C.C. 653 (1980)	4
<i>Northern Lines Merger Cases</i> , 396 U.S. 491 (1970)....	14
<i>Persian Gulf Outward Freight Conference v. FMC</i> , 361 F.2d 80 (D.C. Cir. 1966)	9
<i>Railroad Consolidation Procedures</i> , 359 I.C.C. 195 (1978).....	3
<i>Railroad Consolidation Procedures, General Policy Statement</i> , 363 I.C.C. 784 (1981)	3,7
<i>Rogers v. Western Pacific Railroad Co. and Union Pacific Railroad Co.</i> , C.A. No. 7274 (Del. Ch. Ct., Newcastle County)	12
<i>Schwabacher v. United States</i> , 334 U.S. 182 (1948) ...	12
<i>Seaboard Air Line Railroad Co.—Merger—Atlantic Coast Line</i> , 320 I.C.C. 122 (1963)	13
<i>Seaboard World Airlines, Inc. v. Tiger International, Inc.</i> , 600 F.2d 355 (2d Cir. 1979)	13
<i>Southern Pacific Transportation Co. v. Interstate Commerce Commission</i> , 736 F.2d 708 (D.C. Cir. 1984)	passim
<i>T.S.C. Motor Freight Lines, Inc. v. United States</i> , 186 F. Supp. 777 (S.D. Tex. 1960), <i>aff'd sub nom. Herring Transp. Co. v. United States</i> , 366 U.S. 419 (1961)	10
<i>Unemployment Compensation Commission v. Aragon</i> , 329 U.S. 143 (1946)	9
<i>Union Pacific Railroad Company v. United States</i> , 637 F.2d 764 (10th Cir. 1981)	9
<i>Union Pacific Corporation, Pacific Rail System, Inc. and Union Pacific Railroad Company—Control—Missouri Pacific Corporation and Missouri Pacific Railroad Company</i> , 366 I.C.C. 463 (1982)	passim

	<u>Page</u>
<i>United States v. Storer Broadcasting Co.</i> , 351 U.S. 192 (1956)	7
<i>Weinberger v. UOP, Inc.</i> , 457 A.2d 701 (Del. Supr. 1983)	13
 STATUTES AND REGULATIONS:	
49 C.F.R. § 1100.98(f) (1981)	9
Interstate Commerce Act	
49 U.S.C. § 11343	2
49 U.S.C. § 11344	8,11
49 U.S.C. § 11347	11
Del. Code Ann., tit. 8, § 262(a) (Supp. 1981)	12-13
H.R. Conf. Rep. No. 1430, 96th Cong., 2d Sess. 120 (1980) <i>reprinted in</i> 1980 U.S. Code Cong. & Ad. News, 96th Cong. 4152	8
Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, § 101(a)(2), 90 Stat. 31 (1976)	2
Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (1980)	7,8

IN THE
Supreme Court of the United States

OCTOBER TERM, 1984

Nos. 84-621, 84-633, 84-641

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES,
EDWARD K. WHEELER, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA,
THE INTERSTATE COMMERCE COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the
District of Columbia Circuit

BRIEF OF RESPONDENTS UNION PACIFIC CORPORATION,
UNION PACIFIC RAILROAD COMPANY,
MISSOURI PACIFIC CORPORATION,
MISSOURI PACIFIC RAILROAD COMPANY
AND THE WESTERN PACIFIC RAILROAD COMPANY
IN OPPOSITION TO PETITIONS

Respondents Union Pacific Corporation, Union Pacific Railroad Company (collectively, "Union Pacific"), Missouri Pacific Corporation, Missouri Pacific Railroad Company (collectively, "Missouri Pacific") and The Western Pacific Railroad Company, intervenors in the court below and referred to herein as "respondents," submit this brief in opposition to the petitions for certiorari filed by Kansas City Southern Railway Company and Louisiana & Arkansas Railway Company (collectively, "KCS"), the Brotherhood of Maintenance of Way Employees

and various other rail labor unions (collectively, "the labor parties"), and Edward K. Wheeler.¹

STATEMENT OF THE CASE

On December 22, 1982, after Chief Justice Burger had denied several applications for stay,² Union Pacific acquired control of Missouri Pacific and Western Pacific, and thereby created a single, consolidated railroad.³ Since then, the facilities, operations and managements of the three companies have been integrated, and the consolidated system has been offering "single-system service" to shippers in the western United States.

These transactions were authorized by an order and decision of the Interstate Commerce Commission, served October 20, 1982, which petitioners challenged unsuccessfully below.⁴ App. 39a *et seq.*; see generally 49 U.S.C. § 11343 (Supp. IV 1980), App. 639a. After extensive administrative proceedings, in which the Antitrust Division of the Department of Justice, the Department of Transportation and numerous state governments participated, the ICC determined in a 360-page decision that the consolidations, as conditioned, would be in the public

¹ Respondents' parents, subsidiaries and affiliates are identified in the Appendix to this brief.

² *Atchison, Topeka and Santa Fe Railway Co., et al. v. Interstate Commerce Commission*, Nos. A-544, A-545 and A-546 (Dec. 22, 1982) (Burger, C.J.). That decision was subsequently embraced by the entire Court. See 51 U.S.L.W. 3507 (U.S. Jan. 11, 1983).

³ Union Pacific obtained 77 percent of Western Pacific's stock in a tender offer of \$20 per share that expired in March 1980; those shares remained in an independent voting trust until December 22, 1982. (Union Pacific had previously acquired 9.9 percent of Western Pacific's stock in open market purchases.) In May 1983, Union Pacific acquired the balance of the outstanding Western Pacific stock for \$20 per share through a merger approved by the ICC. Union Pacific acquired Missouri Pacific through a stock exchange approved by the companies' shareholders in April 1980.

⁴ The ICC's principal opinion was joined by five of the ICC's six Commissioners. Chairman Taylor and Commissioner Simmons also filed concurrences indicating their approval notwithstanding their preference for conditions sought by the Missouri-Kansas-Texas ("MKT") and Burlington Northern railroads that did not receive majority support. Neither of those railroads submitted briefs below in opposition to the ICC's order.

interest, and it found substantial public benefits arising from better service, more efficient operations, enhanced competition, improved job security for employees, and higher levels of employment. *E.g.*, App. 84a *et seq.* The ICC also determined that the terms of the transactions were fair to respondents' shareholders. *E.g.*, App. 298a *et seq.*⁵ The ICC subsequently denied several requests for rehearing, and it actively opposed all efforts to stay the effectiveness of its order.⁶

The various petitions for review of the ICC's order were consolidated for decision in the D.C. Circuit Court. The transactions were consummated several weeks later, after that court (Circuit Judges Mikva and Scalia) and Chief Justice Burger had denied petitioners' requests for stay. Thereafter, in a *per curiam* opinion, Circuit Judges Wright, Mikva and Bork affirmed the Commission's decision in all relevant respects.⁷

Summary Of Petitions

Petitioners raise here several discrete issues, none of which was a significant factor in the proceedings before the ICC or the

⁵ The Commission imposed several conditions to maintain the level of competition in the new system's market areas (trackage rights for the Southern Pacific, Denver & Rio Grande Western ("DRGW") and MKT railroads), and it approved respondents' settlements with Conrail and the Chicago & North Western Transportation Company.

⁶ The ICC's approval of the consolidations was consistent with recent federal initiatives encouraging end-to-end rail consolidations. For example, the Railroad Revitalization and Regulatory Reform Act of 1976 endorsed "efforts to restructure [the national railway] system on a more economically justified basis." Pub. L. No. 94-210, § 101(a)(2), 90 Stat. 31, 33 (1976). This legislation was followed by the ICC's development of general policy statements reflecting the congressional policy, and by the ICC's subsequent approval of several rail consolidations similar in nature and scope to those approved here. See Railroad Consolidation Procedures, 359 I.C.C. 195 (1978); Railroad Consolidation Procedures, General Policy Statement, 363 I.C.C. 784 (1981).

⁷ The Court remanded to the ICC for further consideration of one discrete issue. See App. 32a-33a. That issue concerned the Commission's denial of DRGW's request for a condition affording it "independent rate-making authority" over the Western Pacific portion of the consolidated system. After additional briefing, that issue is now awaiting decision by the ICC.

affirmance below of the Commission's decision. While ten railroad protestants challenged the transactions at various stages below, only KCS has sought review of the Court of Appeals' decision. A highly successful railroad not threatened by the consolidations (App. 243a), KCS has acknowledged that its objective in the proceedings was "personal aggrandizement at the expense of the merging parties."⁸ It asked the Commission to expand its system by imposing as conditions to the consolidations trackage rights over nearly 1,000 miles of Missouri Pacific lines; KCS admitted that such rights were totally unrelated to the competitive impact of the consolidations. See App. 28a. The ICC's denial of that request is the principal focus of KCS' petition.

The labor parties' interest here is no more compelling. The ICC found that the approved transactions "will directly benefit labor both by producing a substantial net increase in existing and future employment opportunities and by increasing the job security of their present employees" (App. 277a); nonetheless, the Commission imposed very generous labor protective conditions that obviate any adverse impact of the approved transactions on respondent employees.⁹ App. 281a. The D.C. Circuit Court affirmed the Commission's refusal to expand the scope of that labor protection in a decision that recognized the 44 years of consistent ICC decisions on this issue. The Second, Fifth and Seventh Circuit Courts have reached the same result in the last five years.

While several dissenting shareholders challenged the transactions before the ICC, only petitioner Wheeler, a dissenting Western Pacific shareholder, continues to challenge the ICC's

⁸ Transcript of ICC Oral Argument, at 180-81.

⁹ These conditions afford adversely affected employees generous displacement allowances, dismissal allowances and fringe benefits for an extended period after implementation of the transactions. See generally, *New York Dock Ry.—Control—Brooklyn Eastern District*, 366 I.C.C. 60 (1979); *Norfolk and Western Ry. Co.—Trackage Rights—BN*, 354 I.C.C. 605 (1978), as modified by *Mendocino Coast Ry., Inc.—Lease and Operate*, 360 I.C.C. 653, 664 (1980).

finding that \$20 per share was a fair price for Western Pacific. Wheeler makes this challenge notwithstanding (1) that the D.C. Circuit Court, after a thorough and detailed analysis, squarely rejected each of his arguments; (2) that the \$20 price represented a substantial premium over the market price of Western Pacific stock at the time of the acquisition agreement; (3) that the ICC had valued Western Pacific at 50 percent of the offering price only one year before the acquisition agreement; and (4) that appraisal proceedings addressing the value of Western Pacific's stock have been initiated in Delaware state court by dissenting Western Pacific shareholders.

SUMMARY OF ARGUMENT

The decision below is fully consistent with every relevant Supreme Court and Court of Appeals decision addressing the issues presented, none of which involves an unsettled question of federal law. Accordingly, the petitions fail to satisfy this Court's traditional criteria for review.

While KCS contends that the Interstate Commerce Commission should "act as a roving ombudsman restructuring railroads on its own" whenever a consolidation application is submitted for review (see p. 7, below), its position has absolutely no legal support. The D.C. Circuit Court correctly determined that the ICC's rejection of KCS' request for a market extension unrelated to the approved transaction was well within the scope of its discretion.

The ICC's Order approving the transactions was endorsed by a majority of the ICC's six Commissioners. The concurring votes of two Commissioners—both of whom expressly approved the ICC's Order in their separate concurring opinions—cannot be read as constructive "dissents," as KCS contends.

The D.C. Circuit Court properly declined KCS' invitation to substitute its judgment for the judgment of the Commission on a variety of highly technical, quantitative issues. The court below expressly and properly applied the standard of review prescribed by the Administrative Procedure Act and this

Court's precedents. Its affirmance of the Commission's calculation of the public benefits generated by the consolidations does not warrant further review.

Pursuant to its statutory obligations, the ICC imposed for the benefit of adversely affected applicant employees very generous labor protective conditions. The ICC was not obligated to impose protective conditions for the benefit of other railroads' employees adversely affected by the approved transactions. The Second, Fifth, Seventh and D.C. Circuit Courts have all recently held that the conditions imposed by the ICC fully satisfy the governing statute. There is no basis for this Court to review that consistent line of Circuit Court precedent.

The factual issue presented by Wheeler—whether \$20 per share was a reasonable price for Western Pacific—does not warrant further review in light of the Court of Appeals' holdings (1) that the ICC's "methodology of valuation is reasonable," (2) that the ICC's "conclusions are supported by substantial evidence in the record," and (3) that the transaction was the result of "arm's length negotiations." App. 36a-37a.

REASONS FOR DENYING THE WRIT

None of the issues presented satisfies this Court's traditional criteria for certiorari. The D.C. Circuit Court's decision is fully consistent with every relevant Supreme Court and Court of Appeals decision addressing the issues presented. Moreover, on almost every issue, the ICC decision affirmed by the Court of Appeals followed consistent and longstanding administrative constructions of the relevant statutes; none of the issues presented involves unsettled questions of federal law. Under these circumstances, the petitions present no basis for this Court's review.

KCS

1. The issues presented by KCS are simple and straightforward. First, with scarcely a mention of the D.C. Circuit's analysis (App. 27a-29a), KCS complains that the ICC erred in

refusing to grant its request for a market extension that KCS admitted has no relationship to the competitive impact of the consolidations. Pet. 9-16. See App. 243a; p. 4, above. The issue presented by KCS is thus one of transportation policy: whether, in the context of rail merger proceedings, the Commission should "act as a roving ombudsman restructuring railroads on its own." App. 29a. While KCS argues that "rove [the ICC] must" (Pet. 15), its position has no support in judicial or administrative precedent or in the relevant statutes. And there certainly is no reason for this Court to address that policy issue, which Congress and the ICC have already resolved in a manner contrary to KCS' position.

The ICC's requirement that conditions be "related to the impact of the consolidation" was developed in rulemaking proceedings addressing public interest standards for conditioning proposed consolidations. *Railroad Consolidation Procedures, General Policy Statement*, 363 I.C.C. 784, 792 (1981). For that reason, the ICC could have "barr[ed] at the threshold" KCS' request.¹⁰ *Federal Power Commission v. Texaco*, 377 U.S. 33, 39 (1964); accord, *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 205 (1956). Nonetheless, the Commission evaluated the merits of KCS' proposed change in its policy and, in a thorough and well reasoned analysis, determined that such a change was not consistent with the public interest, a view shared by the Departments of Justice and Transportation. See App. 194a-197a.

In response to the unanimous conclusions of the D.C. Circuit Court, the ICC, and the Departments of Justice and Transportation, KCS argues only that denial of its requested market extensions frustrates the "procompetitive policy" of the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (1980). Pet. 9. But by its very terms, the Staggers Act does not apply to applications—including those in this proceeding—that were pending before the ICC prior to October 1, 1980: such

¹⁰ This is particularly true here, for KCS opted not to participate in the Commission's rule-making proceeding (*Railroad Consolidation Procedures, supra*, 363 I.C.C. at 784-85), even though it had an opportunity to do so after respondents' consolidation applications were filed.

applications "shall be adjudicated or determined as if this Act had not been enacted." *Id.*, § 228(e), 94 Stat. at 1934.¹¹ Because KCS' entire position rests on its strained reading of a statute that the ICC was not required to apply, there simply is no relevant issue presented here for review.

In any event, the substance of KCS' argument badly distorts the Staggers Act. According to KCS, "this *new* policy imposes a *new* burden on the Commission in protecting the public interest in merger proceedings." Pet. 11 (emphasis added). But the legislative history of the Act confirms that it "would make *no changes* in the present law with respect to major rail mergers: the ICC would consider such proposals under existing standards." H.R. Conf. Rep. No. 1430, 96th Cong., 2d Sess. 120 (1980) (emphasis added), *reprinted in* 1980 U.S. Code Cong. & Ad. News, 96th Cong. 4152. If anything, the Staggers Act's emphasis on deregulation refutes the notion that Congress intended government action to displace private initiative as the vehicle for restructuring the nation's rail system. As the D.C. Circuit Court correctly held, KCS' requests for market extensions were properly denied by the ICC. Further review of that underlying policy judgment is not warranted.

2. KCS next contends that the ICC order approving the transactions was "not approved by a majority of Commissioners." With an Alice-in-Wonderland perspective, KCS ignores the fact that five of the six ICC Commissioners enthusiastically endorsed the Decision and Order. Accordingly, this issue, which has virtually no legal substance, does not warrant further review.¹²

¹¹ Even though it was not required to do so, the ICC in fact followed the Staggers Act policies in evaluating the consolidations. The ICC's opinion confirmed that "[w]hile the Staggers Act itself is not applicable to this proceeding, the policies set forth in 49 U.S.C. § 11344(b)(5) (1980) as a codification of prior law will be followed." App. 78a. Thus, the court below noted that the ICC merely "elected to adhere to . . . [the Staggers Act's] policies." App. 14a.

¹² As a preliminary matter, it bears emphasis that KCS failed to present this issue to the ICC for its consideration, thus violating its obligation to

(footnote continues)

Without reservation, three of the ICC's six Commissioners (Vice Chairman Gilliam and Commissioners Sterrett and Gradison) joined the Commission's opinion approving the transactions, subject to conditions accepted by respondents. Chairman Taylor and Commissioner Simmons each filed a concurring opinion indicating that notwithstanding his preference for additional conditions, the consolidations as conditioned by the ICC's Order are consistent with the public interest and should be approved. See p. 2 n.4, above. Thus, five of the ICC's six Commissioners endorsed the approval order.

KCS' efforts to convert these two Commissioners' affirmative votes into constructive "dissents" is refuted by the language of their opinions. Thus, addressing the principal ICC decision, Chairman Taylor concluded:

"I endorse completely our decision to approve the primary and related applications with appropriate conditions, thereby allowing this consolidation to go forward."

App. 315a.¹³ *Accord*, App. 321a-322a (concurrence of Commissioner Simmons). That should put an end to this issue.¹⁴

(footnote continued)

exhaust administrative remedies. *E.g.*, *Unemployment Compensation Commission v. Aragon*, 329 U.S. 143, 155 & n.15 (1946); see 49 C.F.R. § 1100.98(f) (1981). This omission is particularly egregious here because the issue presented by KCS—whether the Commission incorrectly "tallied" the votes of two of its six Commissioners—was uniquely capable of being clarified by the ICC.

¹³ Chairman Taylor reiterated those views in the ICC's order, served November 18, 1982, denying various motions for stay: "[T]he Commission's conclusions and findings are correct in all material matters of fact and law." Neither he nor Commissioner Simmons dissented from that order or from the ICC's subsequent order, served November 24, 1982, again refusing to delay the approved consolidations. These votes demonstrate that there is no basis for KCS' claim that the affirmative votes of Commissioners Taylor and Simmons should be construed as dissents. *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 862 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971).

¹⁴ KCS' position that the Commissioners should be bound by their initial preferences for other conditions is frivolous. *Union Pacific Railroad Company v. United States*, 637 F.2d 764, 767 (10th Cir. 1981); *accord*, *Persian Gulf Outward Freight Conference v. FMC*, 361 F.2d 80, 84 (D.C. Cir. 1966).

(footnote continues)

3. As its last argument, KCS continues to press its claim that the ICC erred in calculating the precise amount of public benefits generated by the approved transactions. Pet. 19-24. While KCS couches its petition in terms of the standard of review, it seeks here merely to relitigate a variety of highly technical, quantitative issues that were tangential to the result reached by the Commission. The court below properly declined KCS' invitation to substitute its judgment on these complex issues for that of the Commission. It recognized that its obligation under the Administrative Procedure Act was not

"to re-weigh the evidence or to draw our own inferences from the evidence before the Commission. . . . We can ask only whether the Commission has observed the statutory limits that Congress has set for its discretion, whether its action was arbitrary or capricious, or whether its findings are supported by adequate analysis and substantial evidence in the record considered as a whole." ¹⁵

There can be no serious question that this standard was appropriate and fully consistent with this Court's precedents. *E.g., Bowman Transportation, Inc. v. Arkansas Best Freight System*, 419 U.S. 281, 285 (1974); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971).¹⁶

(footnote continued)

There is also no support for KCS' position (Pet. 19) that the concurring opinions should be disregarded because they were not introduced at a formal, "collective" voting conference of the ICC. See, *e.g., T.S.C. Motor Freight Lines, Inc. v. United States*, 186 F. Supp. 777, 785-86 (S.D. Tex. 1960), *aff'd sub nom. Herring Transp. Co. v. United States*, 366 U.S. 419 (1961) (addressing notation voting system).

¹⁵ App. 12a, *quoting* *Missouri-Kansas-Texas Railroad Co. v. United States*, 632 F.2d 392, 399-400 (5th Cir. 1980), *cert. denied*, 451 U.S. 1017 (1981).

¹⁶ KCS fails even to acknowledge the D.C. Circuit Court's explicit discussion (App. 12a) of the standard of review. Moreover, KCS' suggestion that the D.C. Circuit applied a different standard—a so-called "independent judgment test"—is disingenuous. KCS Pet. 20. The D.C. Circuit did indeed find that the ICC had exercised "independent judgment" in evaluating the administrative record. App. 24a. But that finding was directly responsive to KCS' arguments below that the ICC had not exercised independent judgment in calculating the public benefits. See, *e.g., KCS Br.* at 51 ("The ICC's findings [are] based solely on the costing approach taken by the UP parties").

The Labor Parties

Pursuant to its statutory obligation, the ICC considered "the interest of carrier employees affected by the proposed transaction," and imposed for the benefit of displaced applicant employees substantial protective conditions. App. 276a *et seq.*; 49 U.S.C. § 11344(b)(4) (Supp. IV 1980), App. 642a; see 49 U.S.C. § 11347 (Supp. IV 1980). See also p. 4 n. 9, above. The federal courts of appeals consistently have held that these conditions, known as the *New York Dock* conditions, fully satisfy the pertinent statutes. *E.g., Brotherhood of Maintenance of Way Employees v. ICC*, 698 F.2d 315 (7th Cir. 1983).

The labor unions challenged below the ICC's refusal (App. 200a) to extend the *New York Dock* conditions to employees of non-applicant carriers allegedly affected by the consolidations; the Court of Appeals sustained that decision. App. 34a; *accord, Lamoille Valley Railroad Co. v. ICC*, 711 F.2d 295, 323-24 (D.C. Cir. 1983).¹⁷ This is by no means a novel issue. The unions have "urged [this] broader interpretation upon the Commission and reviewing courts since 1946" *Missouri-Kansas-Texas Railroad Co. v. United States*, 632 F.2d 392, 411 (5th Cir. 1980), *cert. denied*, 451 U.S. 1017 (1981). In the last five years alone, the Second, Fifth and Seventh Circuit Courts, as well as the D.C. Circuit Court, have firmly and unambiguously refused to expand the scope of the *New York Dock* protections. *Id.* at 411-13 ("We affirm the Commission's view that § 11347 requires protection only for employees of the merging carriers"); see *Brotherhood of Maintenance of Way Employees v. ICC*, *supra*, 698 F.2d at 318 (the arguments "do not become more convincing by reiteration"); *New York Dock Railway Co. v. United States*, 609 F.2d 83, 91-101 (2d Cir. 1979). There is no reason for this Court to review this consistent and longstanding rule of law.

¹⁷ In *Lamoille Valley*, the D.C. Circuit Court recognized that the Commission had "consistently interpreted § 11347, since its original enactment in 1940, to exclude employees of non-applicant railroads." 711 F.2d at 323-24. In addition to recognizing the deference due this long-standing administrative interpretation, the court held that the ICC's consistent view of the statute reflected a "sensible" interpretation of its language that was "strongly support[ed]" by the legislative history, as well as "by considerations of practicality and administrative economy." *Id.*

Wheeler

The issue presented by petitioner Wheeler is essentially a factual question: whether \$20 per share was a reasonable price for Western Pacific. After careful review and analysis, the ICC determined that the \$20 per share "price to be paid for WPRR stock under the merger agreement is fair and reasonable." App. 298a-306a. The Court of Appeals concluded that "the Commission's methodology of valuation is reasonable and that its conclusions are supported by substantial evidence in the record." App. 36a.¹⁸ There is no conceivable basis for this Court to review that finding.

The underlying issue presented by Wheeler is now pending before the Chancery Court in Delaware, where dissenting Western Pacific shareholders have sought appraisal rights afforded by Delaware law.¹⁹ Union Pacific agreed at the time of the transaction not to object to dissenting shareholders' pursuing whatever appraisal remedies they might have under state law. See *Schwabacher v. United States*, 334 U.S. 182, 201 (1948). Therefore, even if the ICC, the Court of Appeals, Western Pacific's management and Salomon Brothers all erred in concluding that the price was fair, dissenting shareholders who pursue their remedies in Delaware presumably would not be "deprive[d] . . . of just and reasonable compensation for [their] property," as Wheeler alleges. Pet. 6.²⁰

¹⁸ The "substantial evidence" to which the Court referred included the opinion of Salomon Brothers, Western Pacific's financial advisers, that the price was fair (App. 298a-299a), and the fact that the \$20 per share offer represented a 38 percent premium over the market price for Western Pacific stock on the day before public announcement of the transaction (App. 305a). In addition, the ICC had valued the shares of Western Pacific at \$10 per share only a year before the agreement. See *Newrail Co.-Purchase-Western Pacific R.R.*, 354 I.C.C. 885, 890, 893, 899-901 (1979). Wheeler was Western Pacific's counsel in *Newrail*, where he urged the ICC to endorse the \$10 per share valuation. See *id.* at 885.

¹⁹ *Rogers, et al. v. Western Pacific Railroad Co. and Union Pacific Railroad Co.*, C.A. No. 7274 (Del. Ch. Ct., Newcastle County); *Bruno v. Western Pacific Railroad Co.*, C.A. No. 7250 (Del. Ch. Ct., Newcastle County).

²⁰ Under Delaware law, shareholders exercising such appraisal rights are entitled to receive the "fair value" of their equity. Del. Code Ann., tit. 8,

(footnote continues)

Wheeler's petition selectively repeats the points that he advanced below, where he argued that the ICC had unreasonably disregarded Western Pacific's land holdings in evaluating the fairness of Union Pacific's tender offer. Pet. 6-12. But as the Court of Appeals recognized, the "Commission did not simply disregard WP's landholdings. Rather, it stated that such holdings are relatively unimportant in the context of the [capitalized earnings] methodology the Commission used in determining a reasonable range of prices for WP's stock." App. 37a; see App. 302a-303a. And, as the court also acknowledged, the capitalized earnings approach has been used in many prior proceedings to evaluate the reasonableness of proposed transactions.²¹ While Wheeler contends that this approach represents a departure from prior Commission practice (Pet. 9-12), his claim is wrong, as demonstrated by the very authorities on which he relies. See, e.g., *Seaboard Air Line Railroad Co.—Merger—Atlantic Coast Line*, 320 I.C.C. 122, 190 (1963) ("the physical values of the railroad properties are not controlling, for under the Schwabacher principle, the predominant factor is the earnings of the properties rather than their values"); see Pet. 9.

The Court of Appeals correctly recognized that

"although the Commission in fulfilling its statutory responsibilities is to carefully review all of the terms of a merger proposal and determine whether they are just and reasonable, it is not for the agency, much less the courts, to dictate the terms of the merger agreement once this standard has been met."

(footnote continued)

§ 262 (a) (Supp. 1981). Fair value is determined by taking into consideration all the elements of value. *Application of Delaware Racing Ass'n*, 42 Del. Ch. 175, 206 (Del. 1965). Recently, in *Weinberger v. UOP, Inc.*, 457 A.2d 701 (Del. Supr. 1983), the Delaware Supreme Court endorsed a "liberal approach [to appraisal proceedings which] must include proof of value by any techniques or methods which are generally considered acceptable in the financial community and otherwise admissible in court . . ."

²¹ App. 37a, citing *Seaboard World Airlines, Inc. v. Tiger International, Inc.*, 600 F.2d 355, 361-62 (2d Cir. 1979) and *Mills v. Electric Auto-Lite Co.*, 552 F.2d 1239, 1247-49 (7th Cir.), cert. denied, 434 U.S. 922 (1977).

App. 37a-38a, quoting *Northern Lines Merger Cases*, 396 U.S. 491, 520 (1970). This is particularly true in circumstances, such as those presented here, where the reviewing court has affirmed the agency's finding that the transaction was the result of "arm's length negotiations" (App. 37a). This Court should reject Wheeler's invitation further to review the Commission's factual determination that \$20 per share was a fair price for the Western Pacific stock.

CONCLUSION

For the reasons stated, the petitions for writs of certiorari should be denied.

Respectfully submitted,

WILLIAM J. McDONALD
345 Park Avenue
New York, New York 10154

JAMES V. DOLAN
PAUL A. CONLEY, JR.
1416 Dodge Street
Omaha, Nebraska 68179

CHARLES A. MILLER*
GREGG H. LEVY
Covington & Burling
1201 Pennsylvania Ave., N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-6000

Counsel for Respondents
Union Pacific Corporation, *et al.*

* Counsel of Record

APPENDIX

APPENDIX

Set forth below, pursuant to Rule 28.1, is a list of all parent companies, subsidiaries (except wholly-owned subsidiaries) and affiliates of Respondents Union Pacific Corporation, Union Pacific Railroad Company, Missouri Pacific Corporation, Missouri Pacific Railroad Company, and The Western Pacific Railroad Company:

Alameda Belt Line
The Alton & Southern Railway Company
Arkansas & Memphis Railway Bridge and
Terminal Company
Bear Creek Uranium Company
The Belt Railway Company of Chicago
Black Butte Coal Company
Brownsville & Matamoros Bridge Company
Camas Prairie Railroad Company
Carbon County Coal Company
Central California Traction Company
Chicago and Western Indiana Railroad Company
Corpus Christi Petrochemical Company
The Denver Union Terminal Railway Company
Esperanza Pipeline Company
Ferguson-Burleson County Gas Gathering System
Frontier Pipeline
Galveston, Houston and Henderson Railroad
Company
Great Southwest Railroad, Inc.
Houston Belt & Terminal Railway Company
Jefferson Southwestern Railroad Company
Kansas City Terminal Railway Company
Longview Switching Company
M-C Carbon Partnership
Medicine Bow Coal Company
Milne Point Pipeline, Inc.
Oakland Terminal Railway
The Ogden Union Railway and Depot Company
Point Arguello Pipeline, Inc.

Portland Traction Company
Portland Terminal Railroad Company
The St. Joseph and Grand Island Railway Company
St. Joseph Terminal Railraod Company
Southern Iilinois and Missouri Bridge Company
Stansbury Coal Company
Stauffer Chemical Company of Wyoming
Terminal Industrial Land Company
Terminal Railroad Association of St. Louis
Texas City Terminal Railway Company
Trailer Train Company
Uinta Development Company
Union Pacific Resources Ltd.

(4) (3) (3)
Nos. 84-621, 84-633, and 84-641

Office-Supreme Court, U.S.
FILED

JAN 14 1985

In the Supreme Court of the United States
OCTOBER TERM, 1984

ALEXANDER L. STEVAS,
CLERK

KANSAS CITY SOUTHERN RAILWAY COMPANY, ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

EDWARD K. WHEELER, PETITIONER

v.

INTERSTATE COMMERCE COMMISSION, ET AL.

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES, ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

ROBERT S. BURK
Acting General Counsel

HENRI F. RUSH
Acting Deputy General Counsel

LAURENCE H. SCHECKER
JOHN J. MCCARTHY, JR.
Attorneys
Interstate Commerce Commission
Washington, D.C. 20423

QUESTIONS PRESENTED

1. Whether a majority of the Interstate Commerce Commission approved the consolidation of these railroad holding companies.

2. Whether the court of appeals applied the proper standard of review in upholding the Commission's decision.

3. Whether the Commission and the court below properly concluded that the Commission is not required to impose conditions upon the merged railroad designed to increase competition if the conditions are not related to the anticompetitive effects of the merger.

4. Whether the Commission and the court of appeals correctly found that the Commission is required to provide protection only for employees of the railroads that are parties to the transaction.

5. Whether the court of appeals properly affirmed the Commission's finding that the price per share paid to minority shareholders pursuant to the merger was fair and reasonable.



TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statement	2
Argument	7
Conclusion	20

TABLE OF AUTHORITIES

Cases:

<i>American Trucking Ass'n v. Atchison, T. & S.F. Ry.</i> , 387 U.S. 397	18
<i>Atchison, T. & S.F. Ry. v. ICC, No. A-545 (Jan. 10, 1984)</i>	15
<i>Brotherhood of Maintenance of Way Employees v. ICC</i> , 698 F.2d 315	15
<i>Burlington Northern, Inc.—Control & Merger—St. Louis</i> , 360 I.C.C. 788, <i>aff'd sub nom. Missouri-Kan.-Tex. R.R. v. United States</i> , 632 F.2d 392, cert. denied, 451 U.S. 1017	9, 14, 15, 16
<i>Chicago, St. P., & O. Ry. v. United States</i> , 322 U.S. 1	10
<i>Consolidated Products Rock Co. v. Dubois</i> , 312 U.S. 510	17
<i>FCC v. National Citizens Committee for Broadcasting</i> , 436 U.S. 775	10
<i>FPC v. Transcontinental Gas Pipe Line Corp.</i> , 365 U.S. 1	10

IV

Page

Cases—Continued:

<i>Florida East Coast Ry. v. United States</i> , 259 F. Supp. 993, aff'd, 386 U.S. 544	15
<i>Illinois Central R.R. v. Norfolk & W. Ry.</i> , 385 U.S. 57	9-10, 12
<i>Kansas City S. Ry. v. ICC</i> , No. A-564 (Jan. 10, 1984)	5
<i>Lamoille Valley R.R. v. ICC</i> , 711 F.2d 295	7, 15, 16
<i>Louisville & N.R. Co.—Merger</i> , 295 I.C.C. 457	17-18
<i>McLean Trucking Co. v. United States</i> , 321 U.S. 67	10, 13
<i>Mills v. Electric Auto-Lite Co.</i> , 552 F.2d 1239, cert. denied, 434 U.S. 922	17
<i>Missouri Pac. R.R.—Securities</i> , 347 I.C.C. 377	17
<i>Mobil Oil Corp. v. FPC</i> , 417 U.S. 283	10
<i>NLRB v. Bell Aerospace Co.</i> , 416 U.S. 267	14
<i>NEW^{ew} York Dock Ry.—Control—Brooklyn Eastern Dist.</i> , 360 I.C.C. 60, aff'd, 609 F.2d 83	4, 15
<i>Penn-Central Merger Cases</i> , 389 U.S. 486	12
<i>Pennsylvania R.R.—Merger</i> , 347 I.C.C. 536	16
<i>Railroad Consolidation Procedures</i> , 366 I.C.C. 75	14

Cases—Continued:

Railway Labor Executives' Ass'n v. United States:

216 F. Supp. 101 16

226 F. Supp. 521, vacated on other ground,
376 U.S. 199 15-16*Schwabacker v. United States,*

334 U.S. 182 18

*Seaboard Air Line R.R.—Merger—Atlantic Coast
Line, 320 I.C.C. 122* 17*Seaboard World Airlines, Inc. v. Tiger**International, Inc.*, 600 F.2d 355 17*SEC v. Chenery Corp.*, 332 U.S. 194 14*Soo Line R.R. v. United States*, 280

F. Supp. 907 16

Southern Pacific Transp. Co. v. ICC,

No. A-544 (Jan. 10, 1984) 5

*T.S.C. Motor Freight Lines, Inc. v. United**States*, 186 F. Supp. 77, *aff'd sub nom.**Herrin Transp. Co. v. United States,*

366 U.S. 419 9

Udall v. Tallman, 380 U.S. 1 16*Union Pacific—Control-Missouri Pac.—Western**Pac.*, Finance Docket No. 30,000 (severed

July 31, 1984) 5

United States v. ICC, 396 U.S.

491 12, 13, 19

*United States v. L.A. Tucker Truck Lines,**Inc.*, 344 U.S. 33 9

VI

Page

Cases—Continued:

<i>Universal Camera Corp. v. NLRB</i> , 340 U.S. 474	10
<i>Vermont Yankee Nuclear Power Co. v. Natural Resources Defense Council, Inc.</i> , 435 U.S. 519	9

Statutes:

Interstate Commerce Act, 49 U.S.C.	
10101 <i>et seq.</i> :	
49 U.S.C. 10101a	3, 13
49 U.S.C. 10101a(1)	13
49 U.S.C. 10101a(2)	13
49 U.S.C. 11343	2
49 U.S.C. 11344(b)	3, 12
49 U.S.C. 11344(b)(1)	12
49 U.S.C. 11344(b)(1)(A)-(D)	12
49 U.S.C. 11344(b)(1)(D)	14
49 U.S.C. 11344(b)(1)(E)	12
49 U.S.C. 11344(c)	12
49 U.S.C. 11347	12
Pacific Railroad Act, 45 U.S.C. 83	4
Staggers Rail Act of 1980, Pub. L. No. 96-448,	
94 Stat. 1895 <i>et seq.</i>	11

In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-621

KANSAS CITY SOUTHERN RAILWAY COMPANY, ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

No. 84-633

EDWARD K. WHEELER, PETITIONER

v.

INTERSTATE COMMERCE COMMISSION, ET AL.

No. 84-641

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES, ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

*ON PETITIONS FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT*

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-38a¹) is reported at 736 F.2d 708. The opinion of the Interstate Commerce Commission (Pet. App. 39a-615a) is reported at 366 I.C.C. 459.

¹"Pet. App." refers to the appendix filed by petitioners in No. 84-621.

JURISDICTION

The judgment of the court of appeals was entered on May 22, 1984. Petitions for rehearing were denied on July 20, 1984 (Pet. App. 621a-629a). The petitions for a writ of certiorari in No. 84-621 and 84-633 were filed on October 17 and 18, 1984, respectively. On August 2, 1984 the Chief Justice extended the time in which to file a petition for a writ of certiorari in No. 84-641 to and including October 19, 1984, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1980, Union Pacific Corporation (UPC), a railroad holding company, reached an agreement to acquire control of a second railroad holding company, Missouri Pacific Corporation (MP), and to merge with a third railroad holding company, Western Pacific Railroad Company (WP).² The parties filed applications with the Interstate Commerce Commission for authority to consummate these transactions pursuant to 49 U.S.C. 11343. Petitioners were among the numerous public and private parties who participated in the ensuing Commission proceeding.³

Petitioner Kansas City Southern Railway Company (KCS)⁴ urged the Commission to deny the application filed by UPC and MP unless KCS received trackage rights over

²These are the abbreviations that are used by the petitioners in No. 84-621 (Pet. ii n.*).

³Numerous railroads, shippers, governmental agencies (including the United States Department of Justice), state and local governments, stockholders, and labor organizations participated in the proceeding before the Commission (see Pet. App. 65a-77a). The proceeding lasted two years, involved ten months of oral hearings before two administrative law judges, and amassed a record consisting of over 18,000 pages of transcript and more than 600 exhibits (see *id.* at 5a-6a).

⁴The second petitioner in No. 84-621, Louisiana & Arkansas Railway Company, is a wholly-owned subsidiary of KCS.

certain MP railroad lines (Pet. App. 70a-71a, 240a). Track-age rights enable one railroad to operate over tracks owned by another railroad for a fee paid to the owner of the tracks. KCS argued that these rights were necessary both to offset what it asserted would be the anticompetitive effects of the consolidation and to enhance its inferior competitive position, which it conceded was unrelated to any anticompetitive effects of the consolidation (Pet. App. 70a-71a, 240a-242a).

Petitioners Brotherhood of Maintenance of Way Employees, et al. (BMWE),⁵ argued (Pet. App. 76a) that railway labor interests would be harmed by the proposed consolidation. They advocated the imposition of conditions to protect not only the employees of the merging carriers but also employees of other railroads who might somehow be affected by the consolidation.

Petitioner Wheeler, a stockholder in WP, neither supported nor opposed the merger of UPC and WP. He argued that the price offered by UPC for the WP stock was neither fair nor reasonable (Pet. App. 299a-300a).

The Commission's review of the proposed consolidation was careful and complete (see Pet. App. 39a-615a). Pursuant to the standard contained in 49 U.S.C. 11344(b), the Commission examined the effect of the consolidation on the adequacy of transportation for the public, the effect on the public interest of including other railroads in the area in the proposed transactions, the total fixed charges that would result from the consolidation, and the interests of affected employees (Pet. App. 84a-105a, 276a-282a, 287a). The Commission thoroughly examined the competitive effects of the proposed transactions, and measured the proposals against the national transportation policy set

⁵All of the petitioners in No. 84-641 are unions that represent railroad workers.

forth in 49 U.S.C. 10101a (Pet. App. 111a-168a, 358a-538a). The Commission also considered whether the transactions would cause any harm to any railroads' essential services (*id.* at 168a-172a). Finally, the Commission considered whether it should require the imposition of any conditions to protect the public or to protect other railroads (*id.* at 193a-250a).⁶

The Commission concluded that, provided certain conditions were imposed, the consolidation was consistent with the public interest (Pet. App. 55a-60a, 84a). It found that the consolidation would result in substantial public benefits without the loss of essential services (*id.* at 84a-104a, 168a-172a, 538a-594a). While some adverse competitive effects could have resulted from the consolidation (*id.* at 149a), the Commission determined that the grant of certain trackage rights to competing railroads would ameliorate the anti-competitive effects of the transactions (*id.* at 57a-58a, 220a, 229a-230a). The Commission did not require the granting of the trackage rights sought by petitioner KCS because it determined that the anticompetitive conditions cited by KCS did not result from the consolidation (*id.* at 240a-245a). The Commission concluded that employees' interests would be safeguarded by the "New York Dock Conditions" traditionally imposed for the protection of the employees of consolidating carriers, and declined to impose conditions to protect the employees of other railroads (*id.* at 276a-281a).⁷

⁶The Commission addressed a number of other issues that are not relevant to petitioners' arguments in this Court. These issues include the effect of the Pacific Railroad Act, 45 U.S.C. 83, on the UPC/WP consolidation (Pet. App. 172a-193a); removal of certain traffic protective conditions (*id.* at 236a-238a); approval of certain settlements between various parties and the applicant railroads (*id.* at 250a-276a); and environmental considerations (*id.* at 282a-287a).

⁷The "New York Dock Conditions" refer to the labor protective conditions usually imposed by the Commission in rail mergers, which were developed by the Commission in *New York Dock Ry.—Control—Brooklyn Eastern Dist.*, 360 I.C.C. 60, *aff'd*, 609 F.2d 83 (2d Cir. 1979).

Finally, the Commission concluded that the price to be paid by UPC for the WP stock was fair and reasonable (*id.* at 298a-306a).

2. The Commission and the court of appeals denied several motions for a stay of the Commission's decision approving the consolidation, except for a temporary stay to enable the parties to seek a stay from this Court (Pet. App. 12a n.5). The application for a stay filed by KCS in this Court was denied by the Chief Justice, and the transactions were consummated. The application subsequently was referred to Justice Stevens, who in turn referred it to the entire Court, which also denied the application for a stay.⁸

3. The court of appeals affirmed the Commission's decision in all respects relevant to petitioners' claims before this Court (Pet. App. 1a-38a).⁹ The court first addressed the challenges to the Commission's determination that the consolidation was consistent with the public interest (*id.* at 13a-26a).¹⁰ It concluded that the Commission had given

⁸*Southern Pacific Transp. Co. v. ICC*, No. A-544 (Jan. 10, 1984); *Atchison, T. & S.F. Ry. v. ICC*, No. A-545 (Jan. 10, 1984); and *Kansas City S. Ry. v. ICC*, No. A-546 (Jan. 10, 1984).

⁹The court of appeals remanded the proceeding to the Commission "for further consideration and explanation" of the agency's refusal to grant the request of Denver & Rio Grande Western Railroad Company (DRGW) for independent ratemaking authority over WP's tracks between Utah and Northern California (Pet. App. 32a-33a). This authority would have required the merged railroad to adopt automatically the rate set by DRGW over certain routings. The Commission did not seek review of this decision, and has reopened the proceeding to again consider this issue. *Union Pacific—Control—Missouri Pac.—Western Pac.*, Finance Docket No. 30,000, (severed July 31, 1984) (not printed).

¹⁰The court of appeals did not address directly the contention of petitioner KCS (see pp. 7-9, *infra*) that the Commission did not approve the consolidation by a majority vote. However, this argument was the basis of KCS's application for a stay and its motion for summary

proper recognition to the role of competition in analyzing the consolidation (*id.* at 14a, 17a-19a). The court observed that “[t]he Commission has always, and should continue, to perform a balancing test which takes a myriad of factors—including competition—into consideration and weighs ‘the potential benefits to applicants and the public against the potential harm to the public’ ” (*id.* at 18a (citation omitted)).

The court rejected contentions by various parties that the Commission’s analysis of the public benefits flowing from the proposed consolidation was flawed (Pet. App. 22a-24a). The court accepted the cost figures used in the Commission’s analysis (*id.* at 23a), noting that the Commission performed a searching and critical analysis of the methodology and cost data submitted by the parties and made appropriate adjustments which represented an “exercise[] [of] its independent judgment and expertise with respect to the calculation of public benefits” (*id.* at 24a). The court deferred to the Commission in this “fact-bound and technical area” (*ibid.* (footnote omitted)).

The court of appeals also approved the Commission’s decision to impose certain conditions on the consolidation to ameliorate any anticompetitive effects (Pet. App. 24a-29a). It upheld the Commission’s denial of petitioner KCS’s request for trackage rights (*id.* at 27a-29a) that were “concededly unrelated to the consolidation at issue” and therefore “not designed to mitigate any anti-competitive consequences stemming directly from the consolidation” (*id.* at 28a). The court held (*id.* at 29a) that “the Commission is not required to act as a roving ombudsman restructuring railroads on its own in order to satisfy an individual carrier’s notion of what effective competition may require.”

reversal, each of which was denied by the court of appeals. The court took note of these prior actions in its opinion on the merits (Pet. App. 12a n.5).

The court of appeals rejected the labor petitioners' challenge to the agency's refusal to extend the "New York Dock Conditions" to the employees of non-applicant carriers (Pet. App. 33a-34a). It based its decision on its prior holding in *Lamoille Valley R.R. v. ICC*, 711 F.2d 295, 323-324 (D.C. Cir. 1983), in which the court considered and rejected the same argument.

Finally, the court rejected petitioner Wheeler's challenge to the purchase price offered to WP stockholders. It concluded that the methodology used by the Commission to value the WP stock was reasonable and found that the Commission's conclusion that the offer for the stock was fair was supported by substantial evidence in the record (Pet. App. 35a-38a). In addition, the court concluded that there was substantial evidence to support the Commission's finding that the price resulted from arms' length negotiations between WP and UPC (*id.* at 37a). It held that the Commission took into account all relevant factors, including the enhanced value of the stock in light of the consolidation and WP's land holdings, in arriving at its independent judgment that the offer for the WP stock was fair (*ibid.*).

ARGUMENT

The detailed opinion of the court of appeals, upon which we rely, correctly affirmed the Commission's decision to approve the consolidation of the three railroads without imposing the additional conditions sought by petitioners. The fact-bound determinations challenged by petitioners do not conflict with any decision of this Court or of any other court of appeals. Therefore, further review is not warranted.

1. Petitioner KCS contends (84-621 Pet. 17-19) that a majority of the Commission did not approve the consolidation. The court below properly relegated this matter to the category of "[a]dditional, relatively minor, issues" as to

which the challenges to the Commission's decision were "without merit" (Pet. App. 13a).¹¹

Three commissioners joined in the Commission's opinion without expressing any reservations (see Pet. App. 661a-666a). Chairman Taylor filed a concurring opinion that begins, "I endorse completely our decision to approve the primary and related applications with appropriate conditions, thereby allowing this consolidation to go forward" (Pet. App. 315a). Commissioner Simmons began his concurring opinion by stating: "I join in the Commission's decision to approve, with conditions, the consolidation of the Union Pacific, Missouri and Western Pacific rail systems" (Pet. App. 321a). Although both Chairman Taylor and Commissioner Simmons discussed some changes that might have been made in the Commission decision, they plainly endorsed the Commission decision. Thus, five of the six commissioners voted to approve the consolidation.¹²

KCS's argument is based upon the fact that the vote memoranda circulated by Chairman Taylor and Commissioner Simmons stated that they voted to approve the draft decision "subject to" suggested modifications (Pet. App. 656a, 657a). However, these memoranda, which are dated September 22 and 24, 1982, respectively, simply memorialize the results of a closed conference held on September 13, 1984 at which the Commission voted to *approve* the consolidations (see Pet. App. 653a). In light of this fact, and the subsequent issuance of the concurrences (Pet. App. 671a-674a), it is clear that notwithstanding their preference for

¹¹The court of appeals previously had rejected this argument when it denied KCS' request for a stay of the Commission's order. After the denial of the stay, KCS filed a motion for summary reversal based on this issue; that motion also was denied by the court of appeals. Pet. App. 12a n.5.

¹²Commissioner Andre dissented from the decision (see Pet. App. 323a).

additional conditions, Chairman Taylor and Commissioner Simmons each concluded that the consolidation, as conditioned in the Commission's opinion, was consistent with the public interest.¹³

2. KCS asserts (84-621 Pet. 19-24) that the court of appeals adopted an unduly deferential standard of review in upholding the Commission's determination that substantial public benefits would flow from the consolidation. However, at the outset of its analysis (Pet. App. 11a-12a), the court below set forth the standard of review, quoting from *Missouri-Kan.-Tex. R.R. v. United States*, 632 F.2d 392, 399-400 (5th Cir. 1980) (citation omitted), cert. denied, 451 U.S. 1017 (1981):

"[it is not a court's task] to re-weigh the evidence or to draw [its] own inferences from the evidence before the Commission. [It] can ask only whether the Commission has observed the statutory limits that Congress has set for its discretion, whether its action was arbitrary or capricious, or whether its findings are supported by adequate analysis and substantial evidence in the record considered as a whole."

This formulation is in full accord with the standard for review of Commission decisions prescribed by this Court. See *Illinois Central R.R. v. Norfolk & W. Ry.*, 385

¹³KCS is incorrect in its assertion (84-621 Pet. 19) that the concurring opinions should be disregarded because they were not introduced at a formal collective voting conference of the ICC. See, e.g., *T.S.C. Motor Freight Lines, Inc. v. United States*, 186 F. Supp. 777, 785-786 (S.D. Tex. 1960), *aff'd sub. nom. Herrin Transp. Co. v. United States*, 366 U.S. 419 (1961).

Moreover, KCS's failure to raise this issue before the Commission precludes it from pressing the contention before this Court. See *Vermont Yankee Nuclear Power Co. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 553-554 (1978); *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 36-37 (1952).

U.S. 57, 66, 68-69 (1966); *Chicago, St. P., & O. Ry. v. United States*, 322 U.S. 1, 3 (1944); *McLean Trucking Co. v. United States*, 321 U.S. 67, 87-88 (1944).

Petitioner KCS's argument that the court of appeals applied an improper standard of review is nothing more than an effort (84-621 Pet. 19-24) to raise before this Court its factual arguments concerning the calculation of the public benefits of the consolidation, arguments that were rejected by both the Commission (Pet. App. 84a-105a, 561a-562a, 581a-582a) and the court of appeals (*id.* at 22a-24a). Review of this wholly factual issue is not warranted. See *Mobil Oil Corp. v. FPC*, 417 U.S. 283, 310 (1974); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 491 (1951).

The Commission's determination of the benefits of the consolidation was a prediction of uncertain events, and such " 'a forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency.' " *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 814 (1978), quoting *FPC v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 29 (1961). The court of appeals properly found (Pet. App. 23a-24a) that there was no merit in the challenges to the assumptions and methodology upon which the Commission's calculation of public benefits was based. It therefore properly upheld the Commission's determination that substantial benefits would result from the consolidation.¹⁴ Further review of these factual issues is not warranted.

¹⁴The pitfalls attending the recalculation of benefits urged by KCS are demonstrated by KCS's attempt to discredit the court of appeals' decision by reference to the \$13.6 million reduction in car costs that all parties agree was appropriate (84-621 Pet. 23). A careful analysis of the Commission's finding regarding restatement of the applicants' car costs (Pet. App. 559a-560a) and of the Commission's adjustment of costs contained in Attachment C (Pet. App. 575a) shows that the \$13.603

3. Petitioner KCS's principal argument (84-621 Pet. 9-16) is that the Commission should have granted KCS's request for trackage rights over a portion of the merged railroad in order to increase competition in certain markets, even though the consolidation did not adversely affect competition in those markets. The court below properly rejected this effort "to use the proposed consolidation as a springboard from which to launch a request for conditions having no connection with that consolidation" (Pet. App. 28a-29a).

KCS does not challenge the Commission's conclusion (Pet. App. 242a-244a; see also *id.* at 28a) that KCS's proposed conditions were not related to the competitive effect of the consolidation. It contends (84-621 Pet. 14-16) that both the Commission and the court of appeals erred by holding that the Commission need not consider conditions unless they are designed to ameliorate the anticompetitive effects of the consolidation under review (see Pet. App. 195a-196a, 28a-29a). The argument is based upon KCS's assertion (84-621 Pet. 12) that the Staggers Rail Act of 1980 (Staggers Act), Pub. L. No. 96-448, 94 Stat. 1895 *et seq.*, mandates the imposition of any condition that will increase

million adjustment was made to reduce the applicants' estimate of a \$25.014 million benefit from cars saved through improved utilization of existing cars. This was done by netting the value of equipment saved and the value of the additional equipment required to handle additional traffic, and applying the appropriate rate of return to that net figure. The figure that resulted, \$11.411 million, was then deducted from the value of diverted traffic to reduce the value of that private benefit from the \$40 million estimated by the Commission to \$28.6 million, with a concomitant reduction in the overall benefits (but not the public benefits) of the merger. Compare Pet. App. 569a lines 1 and totals with Pet. App. 575a lines 1, 2(i) and totals. Thus, contrary to the contentions of KCS (84-621 Pet. 23), the Commission not only properly considered the \$13.6 million reduction but also appropriately took account of the costs of additional equipment in computing the *private* benefits of the merger relating to diverted traffic.

competition. This contention is supported by neither the Act's language nor its legislative history.

The Interstate Commerce Act provides that "[t]he Commission shall approve [a merger] * * * when it finds the transaction consistent with the public interest" (49 U.S.C. 11344(c)). In making this determination, the Commission must consider the four factors set out in 49 U.S.C. 11344(b)(1) and the policies of the antitrust laws. *United States v. ICC*, 396 U.S. 491, 504 (1970).¹⁵ The balancing of these factors is a matter for the Commission. *Penn-Central Merger Cases*, 389 U.S. 486, 498-499 (1968); *Illinois Central R.R. v. Norfolk & W. Ry.*, 385 U.S. at 68-69.

Section 11344(b) was amended by the Staggers Act to add a fifth factor to the Commission's consideration of proposed rail mergers — whether the transaction would have an adverse effect on competition among rail carriers in the affected region — which the Commission described simply as a "codification of [its] traditional approach to the evaluation of rail consolidations" (49 U.S.C. 11344(b)(1)(E); Pet. App. 78a). Petitioner KCS's suggestion (84-621 Pet. ~~84-621 Pet.~~ 12-16) that competition has been raised by the Staggers Act to be "the essential public-interest variable" (84-621 Pet. 12) is incorrect. The court of appeals properly rejected this assertion (Pet. App. 17a-18a), noting that:

The increased emphasis on competition required by Congress modifies but does not basically alter the ICC's traditional approach, which has always considered the competitive impact of a proposed merger, but not to the exclusion of other factors. * * * * The

¹⁵The factors set out in the statute are: (1) the effect of the transaction on the adequacy of transportation; (2) the effect on the public interest of including other rail carriers in the area in the transaction; (3) the total fixed charges that would result from the transaction; and (4) the interest of employees. 49 U.S.C. 11344(b)(1)(A)-(D).

Commission has always, and should continue, to perform a balancing test which takes a myriad of factors — including competition — into consideration * * *.

See also *United States v. ICC*, 396 U.S. at 513-514; *McLean Trucking Co. v. United States*, 321 U.S. at 87-88.¹⁶

Moreover, the Commission's refusal to consider conditions directed against anticompetitive effects unrelated to the consolidation actually furthers the procompetitive policy of the Staggers Act. The Commission determined that the use of its conditioning power "to make consolidation proceedings vehicles for rail system restructuring" was contrary to Congress' intent that private initiatives govern the structuring of the rail system (Pet. App. 196a-197a). This conclusion was approved by the court of appeals (*id.* at 28a). Since intrusion into the market by federal regulators is precisely what Congress was seeking to limit in enacting the Staggers Act (see 49 U.S.C. 10101a(1) and (2)), the Commission's approach is fully consistent with its statutory mandate.

In addition, expanding the scope of consolidation proceedings as suggested by KCS "would substantially increase their complexity * * * [and] increase the time required to decide these cases" (Pet. App. 197a). Such an increase in delay resulting from the regulatory process, and the possibility that a variety of unwarranted and burdensome conditions could be imposed on a railroad that sought approval of a merger, could discourage mergers that would be procompetitive and beneficial to the public and hinder the private restructuring of the rail industry that Congress sought to promote.

¹⁶The court below held (Pet. App. 18a-22a) that the Commission gave full consideration to the competitive factors contained in the National Rail Transportation Policy, 49 U.S.C. 10101a, which was enacted as part of the Staggers Act.

In short, the Commission has exercised its authority to “determin[e] that * * * conditions imposed upon the consolidation had rendered that consolidation consistent with the public interest” (Pet. App. 28a). Since that determination was based upon the proper legal standard and was supported by the evidence, and since the Commission has “extraordinarily broad discretion to impose [such] protective conditions” (*id.* at 25a), further review of this question is not warranted.¹⁷

4. Petitioners BMW E et al. do not challenge the Commission’s decision to impose conditions protecting the employees of the parties to the transaction. They assert (84-641 Pet. 15-20) that the statute directing the Commission to require protective provisions for employees “affected by the transaction” (49 U.S.C. 11347) also mandates the protection of the jobs of employees of railroads that are not parties to the consolidation if those employees’ jobs might be affected by the consolidation.¹⁸ The Commission did

¹⁷Petitioner KCS’s argument (84-621 Pet. 16 n.19) that the Commission’s position with regard to this issue is an impermissible “rulemaking by adjudication” is wholly without merit. This Court has consistently held that an agency may formulate and apply policies in adjudications as long as the agency’s action comports with fairness. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 292-294 (1974); *SEC v. Chenery Corp.*, 332 U.S. 194, 202-204 (1947). Here, the Commission did not apply a new policy to KCS’ request for trackage rights. The policy in question was based upon the Commission’s prior policy statement, *Railroad Consolidation Procedures*, 366 I.C.C. 75, 92 (1982), and had been applied previously, with the approval of the United States Court of Appeals for the Fifth Circuit, in *Burlington Northern, Inc.—Control & Merger—St. Louis (BN/ Frisco)*, 360 I.C.C. 788, 950-952 (1980), *aff’d sub nom. Missouri-Kan.-Tex. R.R. v. United States*, 632 F.2d 392 (1980), cert. denied, 451 U.S. 1017 (1981). In that decision the Commission stated that conditions on a consolidation should not be used to ameliorate longstanding problems that are not related to the consolidation under review. See Pet. App. 195a-196a.

¹⁸These petitioners also argue (84-641 Pet. 11-15) that the Commission’s consideration of “the interest of carrier employees affected by the transaction” (49 U.S.C. 11344(b)(1)(D)) must include the effect of

consider additional conditions to protect such employees (Pet. App. 277a-278a), but concluded that they were not required. The decisions of the Commission (*id.* at 278a-281a) and of the court below (*id.* at 34a)¹⁹ that the Commission is not required to impose such conditions are consistent with the decisions of all of the courts of appeals that have considered the question. See *Lamoille Valley R.R. v. ICC*, 711 F.2d at 323-34; *Brotherhood of Maintenance of Way Employees v. ICC*, 698 F.2d 315, 316-318 (7th Cir. 1983); *Missouri-Kan.-Tex. R.R. v. United States*, 632 F.2d at 410-413; see also *New York Dock Ry. v. United States*, 609 F.2d 83 (2d Cir. 1979).²⁰ In addition, the Commission consistently has interpreted 49 U.S.C. 11347 and its predecessor sections as requiring protection only for employees of

the transaction upon all railroad employees, including employees of railroads that are not parties to the transaction. Since the Commission specifically considered the interests of persons employed by railroads other than the applicants (Pet. App. 60a, 225a, 271a-278a, 281a), this Court need not address this issue.

¹⁹The court of appeals (Pet. App. 34a) relied upon its prior decision in *Lamoille Valley R.R. v. ICC*, 711 F.2d at 323-324, in concluding that the Commission's interpretation of 49 U.S.C. 11347 was correct. The court in *Lamoille Valley R.R.* rested its decision on four points. First, it noted that the agency's reading of the statute was "sensible," because Section 11347 refers only to the rail carrier involved in the merger transaction and "its employees" (711 F.2d at 323). Second, the court noted that the legislative history of the statute supported the Commission's interpretation (*ibid.*). Third, the court found that the Commission's interpretation is "supported by considerations of practicality and administrative economy" (711 F.2d at 323-324), because it would be nearly impossible to rebut allegations that non-applicant carrier employees were adversely affected by a proposed merger. Finally, the court relied upon the agency's consistent interpretation of these sections of the Interstate Commerce Act (711 F.2d at 324).

²⁰These decisions are in accord with the weight of district court authority prior to 1975 when Commission decisions were reviewed by three-judge district courts rather than by the courts of appeals. See *Florida East Coast Ry. v. United States*, 259 F. Supp. 993, 1019 (M.D.

the merging carriers. This longstanding administrative interpretation is entitled to substantial deference. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 275 (1974); *Udall v. Tallman*, 380 U.S. 1, 16 (1965). Accordingly, absent a conflict among the circuits, there is no warrant for further review by this Court on this point.

5. Petitioner Wheeler asserts that the Commission failed to discharge its obligation to ensure that the merger proposal is fair to minority shareholders (see *Schwabacher v. United States*, 334 U.S. 182, 198-201 (1948)). These arguments were properly rejected by the Commission (Pet. App. 298a-306a) and the court below (*id.* at 35a-38a).

Petitioner's principal contention (84-633 Pet. 6-12) is that the Commission failed to consider the value of WP's industrial land holdings, and therefore improperly rejected his challenge to the price offered to WP stockholders. Petitioner bases his argument upon the Commission's observation that land values are of little significance in determining the value of stock in an operating railroad (Pet. App. 302a),

Fla. 1966), *aff'd*, 386 U.S. 544 (1967); *Railway Labor Executives' Ass'n v. United States*, 226 F. Supp. 521, 525 (E.D. Va.), vacated on other grounds, 379 U.S. 199 (1964).

Petitioners BMW et al. rely on *Railway Labor Executives' Ass'n v. United States*, 216 F. Supp. 101 (E.D. Va. 1963), and the Commission's decision in *Pennsylvania R.R.—Merger*, 347 I.C.C. 536, 546 (1974). However, as two courts of appeals have noted, *Railway Labor Executives' Ass'n* rests on its own peculiar facts. *Lamoille Valley R.R. v. ICC*, 711 F.2d at 331; *Missouri-Kan.-Tex. R.R. v. United States*, 632 F.2d at 411 n.46. *Pennsylvania R.R.* involved the merger of subsidiaries of the same railroad (see 347 I.C.C. at 546), and therefore is inapposite because only employees of subsidiaries of the merging carriers—who therefore were employees of the applicants—were protected. See *Lamoille Valley R.R. v. ICC*, 711 F.2d at 324 n.60. *Soo Line R.R. v. United States*, 280 F. Supp. 907 (D. Minn. 1968), also relied on by petitioners (84-641 Pet. 16-18), does reach a contrary interpretation of the Interstate Commerce Act's employee protection section, but that aberrant decision has been rejected by the courts of appeals.

but that statement referred to the Commission's decision that the value of stock in a going concern such as a railroad "is to be measured by earnings power rather than * * * book value which may never be realized" (*id.* at 303a). Thus, the Commission did not find the land holdings irrelevant, it simply decided to account for those holdings indirectly, rather than directly, in the valuation process (see *id.* at 37a).

The Commission's decision to utilize a valuation method based upon the railroad's earning power (its "going concern" value) and not its book value is consistent with its prior decisions concerning this issue. See *Missouri Pac. R.R.—Securities*, 347 I.C.C. 377, 411 (1973); *Seaboard Air Line R.R.—Merger—Atlantic Coast Line*, 320 I.C.C. 122, 193 (1963); cf. *Consolidated Rock Co. v. Dubois*, 312 U.S. 510, 526 (1941). The record clearly indicates that the value of WP's land was reflected in the methodology used by the Commission to determine the stock's going concern value. As the court of appeals found (Pet. App. 37a), the hypothetical market price for the stock constructed by the Commission included the value of the land. This is because "in a free and actively traded [securities] market, absent compelling reasons to believe otherwise, the market price is held to take account of asset value as well as the other economic, political, and financial factors that determine 'value.' " *Seaboard World Airlines, Inc. v. Tiger International, Inc.*, 600 F.2d 355, 361-362 (2d Cir. 1979); see also *Mills v. Electric Auto-Lite Co.*, 552 F.2d 1239, 1245-1247 (7th Cir.), cert. denied, 434 U.S. 922 (1977).²¹

²¹Petitioner Wheeler asserts (84-633 Pet. 8 n.3) that the Commission improperly relied upon stock market prices in ascertaining the railroad's going concern value. His claim that the Commission's prior decisions bar the use of this methodology is incorrect. As petitioner admits (*ibid.*), these decisions indicate that market prices are one appropriate measure of going concern value. See, e.g., *Louisville &*

The value of WP's land holdings also was taken into account in setting the negotiated price of twenty dollars per share. As the Commission indicated (Pet. App. 301a), Salomon Brothers, the investment bankers retained to advise WP's Board of Directors, considered all elements of value in the WP enterprise, including book value and net asset value (*id.* at 298a-299a, 301a), in determining a fair price for the stock.²² The Commission relied upon this negotiated price in approving the fairness of the transaction (*id.* at 306a). The court of appeals satisfied itself that

N.R. Co.—Merger, 295 I.C.C. 457, 498 (1957). Moreover, even if the Commission did apply a slightly different test in this case, petitioner Wheeler has cited no authority to support his apparent view that the Commission cannot change the methodology used to ascertain going concern value. Cf. *American Trucking Ass'n v. Atchison, T. & S.F. Ry.*, 387 U.S. 397, 416 (1967) (the Commission is "neither required nor supposed to regulate the present and the future within the inflexible limits of yesterday"). The state law cited by Wheeler (84-633 Pet. 10-12) obviously does not bind the Commission (*Schwabacher v. United States*, 334 U.S. 182, 198 (1948)).

Wheeler's attempt (84-633 Pet. 8 n.3) to show that the stock's market price was an unreliable indicator of WP's earning power also is unavailing. His unsupported, improbable assertions that neither the financial community nor the WP Board of Directors (advised by an independent investment banking firm, Salomon Brothers) was aware of the value of the land holdings and that these holdings were not taken into consideration by UP in establishing its offer provide no basis for rejecting the market price approach. His conclusory statement (*ibid.*) that the market price was "depressed" also is insufficient to undercut the Commission's analysis.

²²Petitioner Wheeler contradicts the record when he asserts (84-633 Pet. 3) that the negotiated twenty dollars per share figure was based solely on WP's "stand alone" value and did not reflect the current value of WP's real estate or the stock's increased value as a result of the merger (see Pet. App. 298a-301a). He contradicts himself when he telescopes the several months of negotiations (84-633 Pet. 3 ("fall of 1979 * * * January 18, 1980")) to "but one afternoon" (*id.* at 10 n.5).

there was substantial record evidence to support the Commission's conclusion that this price was arrived at as a result of arm's length negotiations between WP and UPC (*id.* at 37a). As the court of appeals noted (*id.* at 38a, quoting *United States v. ICC*, 396 U.S. at 520):

“although the Commission in fulfilling its statutory responsibilities is to carefully review all of the terms of the merger proposal and determine whether they are just and reasonable, it is not for the agency, much less the courts, to dictate the terms of the merger agreement once this standard has been met.”

Under this standard, there is no warrant for further review of this issue.²³

²³Petitioner Wheeler's challenge (84-633 Pet. 13) to the Commission's "merger premium analysis" also is meritless. As the court of appeals found (Pet. App. 36a), the Commission properly considered the enhanced value of WP stock as a result of the merger. Petitioner Wheeler's claim is fatally flawed by his misunderstanding of the Commission's construction of the "premium." The Commission found that the present value of the stock's market value, including the "premium," was \$38. However, this determination did not reflect the allocation of the benefits of the merger between the two parties to the merger (see Pet. App. 304a-305a). Allocation of these benefits reduced the stock's constructed value to a range of \$16.25 to \$26.25 (*id.* at 305a-306a). The \$20 per share price offered to stockholders falls within this range, and therefore qualifies as fair and reasonable.

CONCLUSION

The petitions for a writ of certiorari should be denied.
Respectfully submitted.

REX E. LEE
Solicitor General

ROBERT S. BURK
Acting General Counsel

HENRI F. RUSH
Acting Deputy General Counsel

JOHN J. MCCARTHY, JR.

LAURENCE H. SCHECKER

Attorneys

Interstate Commerce Commission

Washington, D.C. 20423

JANUARY 1985



4
No. 84-633

Office - Supreme Court, U.S.
FILED

JAN 18 1985

ALEXANDER L. STEVENS
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1984

EDWARD K. WHEELER,
Petitioner,

v.

INTERSTATE COMMERCE COMMISSION,
UNITED STATES OF AMERICA

and

UNION PACIFIC CORPORATION, *et al.*,
Respondents.

REPLY BRIEF OF PETITIONER
EDWARD K. WHEELER

RICHARD H. STREETER
1729 H Street, N.W.
Washington, D.C. 20006
(202) 337-6500
Attorney for Edward K. Wheeler

TABLE OF CONTENTS

	Page
REPLY ARGUMENT	1
A. The Commission's Methodology Disregarded a Significant Portion of the Value of the WP's Shareholders' Contribution	3
B. The Commission's Methodology Is an Unex- plained Departure From Prior Norms	4
C. The Value of WP's Industrial Land Holdings Was Not Taken Into Account in Setting the Negotiated Price	6
CONCLUSION	9

TABLE OF AUTHORITIES

CASES:

New Haven Inclusion Cases, 399 U.S. 392 (1970) ..	5
Northern Lines Merger Cases, 396 U.S. 491 (1970)	5
Schwabacher v. United States, 334 U.S. 182 (1948)	4
Seaboard Air Line R. Co.—Merger—Atlantic Coast Line, 320 I.C.C. 122 (1963)	4

MISCELLANEOUS:

Valuation of Dissenters' Stock under Appraisal Statutes, 79 Harv. L. Rev. 1453 (1966)	3
--	---



IN THE
Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-633

EDWARD K. WHEELER,
v. *Petitioner,*

INTERSTATE COMMERCE COMMISSION,
UNITED STATES OF AMERICA

and

UNION PACIFIC CORPORATION, *et al.,*
Respondents.

**REPLY BRIEF OF PETITIONER
EDWARD K. WHEELER**

REPLY ARGUMENT

The issue presented is whether the Interstate Commerce Commission ("ICC") was correct in finding that the offer of the Union Pacific Corporation, through a subsidiary ("UP"), to acquire all outstanding shares of the Western Pacific Railroad Company ("WP") for slightly less than \$28 million is "fair." Petitioner, a minority shareholder of WP, respectfully submits that the Commission's valuation methodology was fatally flawed in that it did not consider the current market value of assets contributed by the WP shareholders to the UP, and thereby deprived the minority shareholders of just and reasonable compensation for the property that was taken from them. Briefly stated, the Commission found that

\$28 million was a fair price to pay for both the WP as an operating railroad and for its non-operating real estate when the real estate alone is currently appraised at approximately \$137 million.

In reviewing this matter, the Court is urged to consider that, unlike the situation in an ordinary merger where the former shareholders receive stock of the new corporation in exchange for their shares in the old company and thus continue to realize the economic benefits derived from the assets they contributed, the WP shareholders are being divested of all future interest in their railroad. Not only is their stock being taken from them on the payment of \$20 per share by UP, but they are barred from further participation in any future earnings of the railroad or profits realized from the sale of the real estate which they are being compelled, over their objection, to sell to UP. Hence, it is essential that they be fairly compensated for their property at this time.

It is Petitioner's position that the ICC's valuation methodology resulted in the ICC approving an offering price that reflects *only* the earning power of the WP,¹ and does not include compensation for WP's non-operating real estate. This real estate is not needed or used in WP's railroad operations and is being sold from time to time by UP. Thus, the ICC has authorized UP to force out all WP shareholders and to obtain at least \$137 million of real estate not used in the WP's railroad operations *free of charge* at the expense of the minority shareholders.

¹ It should be noted that the Commission's methodology initially resulted in the shares being valued at \$67 per share (Pet. App. p. 305a). After discounting the estimated future stock price to present value, the Commission still found the shares to have a present value at time of consummation of \$38 per share (*id.*). It was only after the Commission engaged in yet another unprecedented and improper adjustment that it arrived at a value of only \$20 per share. The validity of this final adjustment is a matter before this Court (84-633 Pet. pp. 13-14, n. 10).

A. The Committee's Methodology Disregarded a Significant Portion of the Value of the WP's Shareholders' Contribution

In responding to Petitioner's claim that "the Commission's methodology disregarded a significant portion of the value of the WP shareholders' contribution to the merged company" (84-633 Pet. p. 2), respondents reiterate the lower court's observation that the Commission did not simply disregard WP's landholdings, but rather "stated that such holdings are relatively unimportant in the context of the [capitalized earnings] methodology the Commission used in determining a reasonable range of prices for WP's stock." (UP Br. p. 13, Fed. Res. Br. pp. 16-17). It is respectfully submitted that this is but an exercise in semantics. Whether the value of the real estate was disregarded or simply considered to be relatively unimportant by the ICC, the ultimate effect on WP stockholders is the same.²

² The Federal Respondents' assertion (Br. p. 17) that "[t]he record clearly indicates that the value of WP's land was reflected in the methodology used by the Commission to determine the stock's going concern value" is specious. This assertion is belied by the fact that the Commission and parties were not aware throughout the proceeding of the actual current appraised value of the land. The actual present value was first revealed in a prospectus distributed to WP stockholders after the record was closed and the Commission had issued its decision. A WP shareholder, following the release of the Commission's decision, requested the Commission to reopen to consider evidence of the estimated value of WP's present land holdings as disclosed in the Notice to Shareholders, dated May 2, 1983. The ICC refused to consider these values and denied the petition.

The Federal Respondents' further attempt to bolster this argument by contending that the market price reflected the value of these lands is of no avail. Where such assets are carried on the corporation's books at a mere fraction of their current value, it is unreasonable to conclude that the market price will take account of such assets. See *Note, Valuation of Dissenters' Stock Under Appraisal Statutes*, 79 Harv. L. Rev. 1453-1457 (1966).

The lower court and the Commission simply failed to appreciate that *Schwabacher*³ does not permit the Commission to adopt a formula that irrationally strips shareholders of the value of the most significant asset they are surrendering. While in some instances a simple application of the capitalization of earnings methodology may be appropriate in determining the value of railroad stock and rail properties such as rights-of-way used by the railroad in its on-going railroad operations, the Commission may not blindly ignore other assets contributed by the shareholders which are of greater value than the railroad. This is particularly true where, as here, the railroad's non-operating assets include extremely valuable real estate that is not used in the railroad's on-going operations but is held for development or future appreciation. Such lands do not contribute to the railroad's earnings except when they are sold. In these circumstances, the capitalization of earnings methodology wholly fails to give appropriate considerations to assets that have greatly appreciated in value.

B. The Commission's Methodology Is an Unexplained Departure From Prior Norms

Respondents have also taken issue with Petitioner's arguments that the Commission's unique analytical approach is an unexplained departure from its prior cases. Relying on the single phrase in *Seaboard Air Line Railroad Co.—Merger—Atlantic Coast Line*, 320 I.C.C. 122, 193 (1963) that "the physical values of the railroad properties are not controlling, for under the *Schwabacher* principle, the predominant factor is the earnings of the properties rather than their values," UP fails to observe that the Commission in *Seaboard* specifically identified "ownership of industrial lands" as an additional factor to be considered in determining proposed stock exchange ratios (*id.* p. 190). Furthermore, in that case appro-

³ *Schwabacher v. United States*, 334 U.S. 182 (1948).

priate adjustments in the stock exchange ratio were made "to reflect the earning capacity of Coast Line's industrial lands" (*id.*, p. 191) and "to reflect the excess of Coast Line's industrial lands" (*id.*). In sum, Petitioner adheres to his position that the *Seaboard* decision, as well as the other precedents of both this Court and the Commission, supports the contention that the Commission has consistently taken ownership of industrial land values into consideration in rail merger proceedings.⁴ See *e.g.*, *Northern Lines Merger Cases*, 396 U.S. 491, 516-522; *New Haven Inclusion Cases*, 399 U.S. 392.

In any event, *Seaboard* involved an exchange of stock and the shareholders in the old companies continued to participate in the earnings of the merged enterprise. Here the WP shareholders are being eliminated. Thus this transaction is the equivalent of a liquidation of WP's physical assets whereby the shareholders are receiving \$209 million less than the current value of such assets. It is readily apparent, therefore, that the shareholders have not received compensation that is the economic equivalent of the current worth of the assets they are contributing.

The Federal Respondents (Br. p. 18, n.21) further misconstrue Petitioner's arguments by claiming that he is asserting "the Commission cannot change the methodology used to ascertain going concern value." Such is not the case. Petitioner's argument is simply that the Commission may not disclaim the methodology it applied in finding the UP offer "fair" with the bald statement that "[w]e do not prescribe this analytical approach for general use in evaluating the fairness of terms to shareholders" without identifying or explaining the under-

⁴ Petitioner is not contending that the Commission has not utilized the capitalized earnings approach in the past as UP seemingly implies. Rather, as supported by the Commission's *Seaboard* decision, Petitioner is contending that the Commission's adamant refusal to make appropriate adjustments in that formula in order to reflect the significant value of WP's industrial lands is a marked departure from past Commission merger cases.

lying reasons or facts which caused the Commission to use it herein.

The Federal Respondents (Br. p. 19, n. 23) also contend that Petitioner has misunderstood the Commission's construction of its "merger premium analysis." If such is the case, the Commission must share the blame. As the lower court observed (Pet. App. p. 37a) "the Commission's discussion of this issue is unduly condensed." The basic problem, however, is that the Commission's merger premium analysis was unnecessary. As previously noted (84-633 Pet. p. 14, n. 10), the WP's projected net income which is the foundation of the ICC's capitalization of earnings computations, already reflected the allocation of merger benefits. Hence, by removing the so-called "premium," the Commission has unreasonably stripped WP's shareholders of a portion of the value which they contributed to the merger through the realization of increased earnings.

C. The Value of WP's Industrial Land Holdings Was Not Taken Into Account in Setting the Negotiated Price

In their Brief in Opposition, Federal Respondents, but not UP, claim (Br. p. 18) that "[t]he value of WP's land holdings also was taken into account in setting the negotiated price of twenty dollars per share." This statement is absolutely false.

There is nothing of record to suggest that any of the parties to the negotiations were aware of the current appraised value of the WP's industrial lands on January 18, 1980, when the price of the WP shares was negotiated.⁵ When Mr. Flannery, the Chairman of the

⁵ Federal Respondents further misconstrue Petitioner's argument concerning the negotiations involving the amount to be paid for WP shares when they assert that Wheeler has contradicted himself "when he telescopes the several months of negotiations" to "but one afternoon." It is undisputed that the price to be paid for the WP shares was never discussed between the UP and WP representatives

Board and Chief Executive Officer of the WP, testified one year later, he was asked (Tr. p. 1474): "[w]hat is the fair market value of all of the real estate owned by Western Pacific and its subsidiaries?" He responded, "I wouldn't have any idea because the price of something like that depends on a willing buyer and a willing seller at the time you dispose of it." (*Id.*)⁶ He also testified that the WP's balance sheet would not have shown the fair market value. See Tr. 1476.

The Federal Respondents have not pointed to any evidence of record that would contradict Mr. Flannery's testimony or otherwise support their contention. Instead they allude to language in the Commission's report indicating that Salomon Brothers, in advising the WP's Board of Directors, had "considered all elements of value in the WP enterprise, including book value and net asset value" in determining a fair price.⁷ However, to the

until the afternoon of January 18, 1980. As Mr. Kenefick, the President and CEO and UP, testified (Tr. 980), his discussions with Mr. Flannery did not involve price until January 18. When asked to describe the substance of his discussions with Mr. Flannery, Mr. Kenefick responded (*id.*):

Basically, if he was interested in selling the railroad. And there were some discussions about the general conditions of maintenance and so on. The item of price, though, I can tell you was scrupulously avoided.

⁶ Mr. Flannery also admitted that, at that time, the WP had no appraisal of the fair market value of its San Francisco office building (Tr. 1474). In the subsequent Notice to Stockholders, released two years later, WP revealed that the building, which has a book value of \$536,000, had been the subject of various offers "of up to approximately \$6 million."

⁷ The ICC's description of the financial advisors' activities is subject to criticism. For example, according to the Commission's report (Pet. App. p. 301a) Salomon Brothers ascertained, among other things, the likely merger benefits as part of its fairness inquiry. But, as was conceded by the Salomon Brothers' witness during the course of cross-examination (Bifurcated Tr. 825-826, 834-835, 861), at the time the analysis was prepared, Salomon Brothers did not have any input from anyone concerning the benefits to be derived from the merger. As a result, they relied on

extent that the ICC determined that Salomon Brothers considered the net asset value of the industrial lands in its fairness opinion to the WP Board of Directors, the Commission is in error. The fairness opinion does not mention the real estate owned by WP. Furthermore, while Salomon Brothers had a general familiarity with WP's properties, the fairness opinion specifically states that Salomon Brothers "did not, in connection with our engagement, visit any of those properties, and have not undertaken an independent study to determine the valuation thereof."⁸ If Salomon Brothers placed any value on WP's non-operating real estate at all, it could only have been its book value which was the price paid many years before and did not reflect the present market value of those lands; a value approximating that of all WP's other assets (see 84-633 Pet. Cert. p. 7, n. 2). Obviously, the current fair market value of WP's real estate holdings was disregarded and not taken into account by the WP negotiators as Federal Respondents have erroneously asserted.⁹

"seat-of-the-pants guesstimates" (Br. Tr. 834) which were "assumed out of the air" (Br. Tr. 877).

⁸ "Independent" here means independent of the Company which, as Flannery testified, did not know the fair market value of its real estate. As a practical matter, it is inconceivable that a competent, reputable financial expert such as Salomon Brothers would have advised the WP Board of Directors that \$28 million would be a fair and reasonable price to accept for WP's industrial lands alone, much less the railroad, had they known that the lands were currently appraised in excess of \$137 million.

⁹ As previously noted, *supra*, p. 3 n. 2, it was only after the Commission's decision had been released that WP finally revealed the full extent of the current market value of its industrial lands. As a result, the Commission was not aware of the full value of the WP's industrial lands at the time it rendered its decision and could not have accounted for those holdings either directly or indirectly, as asserted by the Federal Respondents (Br. p. 17). By the same token, the value of WP's industrial lands could not have been reflected in the Commission's methodology, as Federal Respondents incorrectly claim (*id.*).

It should also be noted that there is nothing of record to indicate that UP, at the time the price was negotiated with WP, was aware of the current value of the California real estate owned by WP and not used for rail operations. In fact, Frederick M. R. Smith, UP's financial witness, testified (*Bifurcated Tr.*, p. 763) that he had not assigned a specific value to WP's non-transportation real estate and (*id.*, p. 765) that he did not know whether the value of WP's real estate was substantially greater than its book value.

In sum, the value of these lands was flatly ignored by UP, WP and finally by the Commission. As a result, the WP shareholders were not provided just and reasonable compensation for the true value of their contribution to UP. Given both the Commission's heavy reliance on the negotiations between Mr. Kenefick and Mr. Flannery (who subsequently was made President of UP) and the failure of the negotiators to know, let alone to consider, a major element of the value of WP, it follows that the Commission's finding that UP's offer was fair was arbitrary and capricious. Accordingly, this issue must be returned to the Commission for further consideration.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

RICHARD H. STREETER
1729 H Street, N.W.
Washington, D.C. 20006
(202) 337-6500
Attorney for Edward K. Wheeler